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STUDIES IN BIBLICAL LAW



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STUDIES IN BIBLICAL LAW

BY

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TO
THE MEMORY
OF
ALL WHO HAVE LIVED OR DIED
FOR THE TORAH

PREFACE

THIS little book represents the first attempt to apply the ordinary methods of legal study to the solution of Biblical problems. It consequently contains much that is new and unexpected—how unexpected my readers must decide. At the same time it will arouse justifiable hopes that light may be thrown on many a difficult passage by the great theoretical jurists, who possess a mastery of ancient law with which the mere dilettante knowledge of a practising lawyer can never be compared.

While I have studiously refrained from discussing theological questions, I am not ignorant that all Biblical studies, however unsectarian in character, must react on religious beliefs. I have frequently been compelled to differ from all previous students of the Bible ; but I hope that the orthodox interpreters will think that at the worst there is only room for amicable differences of opinion between us. As a lawyer, I cannot help seeing that the Mosaic legislation is wiser, greater, and infinitely more practical than the traditional explanations would make it. How far the importance of covenants in the history of Judaism will come as a surprise to theologians, I do not know ; but to one who has no knowledge of theology the religious possibilities of the conception would appear to be very great.

In view of the present condition of Biblical studies, I have been compelled to resort to ruthless intellectual weapons. While I have not hesitated to make full use of them, I have felt sincere regret for the pain they must necessarily cause. The books I have refuted were selected because they appeared to be representative of a whole school of thought, and I have throughout regarded their writers as types, not as individuals.

The practice of modern Hebraists with regard to the transliteration of Hebrew words appears to me to require reconsideration. When writing professedly for English readers, they habitually use some system which presupposes an acquaintance with the Hebrew alphabet and method of vocalisation. This must surely increase the difficulties of their readers very considerably. How can an educated Englishman, who has never learnt any Semitic language, be expected to know what sounds to associate with such purely philological symbols as *š*, *h*, *ʿ*, or *dh* ?

In one other matter objection may be taken to the modern practice on very different grounds. To orthodox Jews a free use of the name of God is profoundly distasteful, and I believe that all true lovers of the Bible will agree in thinking that in work which is avowedly unsectarian, every possible precaution should be taken to avoid hurting the religious feelings of any group of students. I have therefore substituted "the LORD" for the various transliterations of the Tetragrammaton in all my quotations from modern writers. I need scarcely say that in no case does this affect the sense of the passages quoted.

The idea of writing a book on Biblical law was first suggested to me by a perusal of Sir Henry Maine's works, and the numerous quotations sufficiently attest my indebtedness to that writer.

My best thanks are due to my friend Mr. H. C. Garsia for much valuable criticism and advice.

HAROLD M. WIENER.

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STUDIES IN BIBLICAL LAW

CHAPTER I

ON THE PRESENT CONDITION OF BIBLICAL STUDIES

AT the head of the Biblical Canon stands a Book which has been known as the Law in many lands and to many generations. The exegesis and criticism of the legal passages it contains present many difficult problems. It will be my endeavour in these pages to put before my readers a lawyer's solutions of some of these.

Primarily, of course, I shall be concerned with jural laws—that is, roughly, rules which the courts will enforce—but not with sacrificial or agricultural regulations, nor with dietary, sumptuary, or religious precepts. But the jural laws of the Pentateuch are implicated with many other matters, and it is therefore not always possible entirely to exclude all other topics from consideration.

The most remarkable instance of this is afforded by the covenants. Almost the first thing a lawyer discovers is that the structure of the legal portions of the Pentateuch is not intelligible without a knowledge of two forms of religious treaty, which may be termed respectively witness-covenants and token-covenants; and, if I were free to adopt what appears to me the natural order of study, I should investigate the nature

of these covenants before attempting to deal with any other subject.

But in the present condition of Biblical studies it is not competent for a fresh inquirer, who does not belong to any recognised school of Biblical students, to strike out any line of his own, without first examining such of the main conclusions of the dominant school of Biblical critics as affect the subject-matter of his studies. A legal student naturally desires to know everything that can be learnt about the rules he studies—their date, authorship, meaning, structure, style and language—and if, on turning to the study of a body of law, which has never in modern times been examined by any competent lawyer, he finds that certain views are widely current on all these matters, it is his duty to examine those views, and either accept them or give his reasons for rejecting them. If he adopts the latter alternative, he must also put forward other views of his own, together with the facts and reasoning on which they are based.

What then are the views that are at present current among the most advanced type of Biblical students as to the date and origin of these laws? They are the views of a school of writers, who (to distinguish them from textual critics) are known as the higher critics, and stated in outline they are as follows: The five books of the Pentateuch and the book of Joshua are grouped together under the collective name of the Hexateuch, and it is said that these six books were compiled from a number of different documents which are denoted by different symbols. First in order of time were two documents denoted by the letters J and E respectively, which were early combined into a narrative known as JE, the elements of which cannot always be clearly distinguished. The choice of these symbols was due to the fact that in J the Tetragrammaton is freely used

before the revelation of the Divine Name to Moses, while in E the Deity is throughout the book of Genesis referred to by a Hebrew word which means God. The higher critics do not seem to regard the separation of J from E as one of their most certain results, and they are of course unable to fix the date of either narrative or of the combination with absolute precision, but apparently the combined result is assigned to a date not later than 750 B.C. In any case, it is earlier than the bulk of the book of Deuteronomy, which comes from a source called D. Now in 621 B.C., the eighteenth year of King Josiah, a book of the law was found (2 Kings xxii. 8 *seqq.*), and, subject to the possibility that minor additions and alterations were subsequently made, this book is identified with D. Then JE and D were combined in a form known as JED, certain minor modifications being introduced by an editor or editors. This combination is known as the prophetic narrative of the Hexateuch; it is supposed to be the work of a number of prophetic writers or schools. Although it has been repeatedly revised, it has never been rewritten, and it is accordingly possible with a greater or less degree of certainty to separate its different elements. As to its laws, some are Mosaic laws, possibly in their original form, some again are old laws in a new dress, some are perhaps more recent laws. Side by side with this prophetic narrative is a priestly narrative known as P. This document is exilic or post-exilic in date, and forms the groundwork of the Hexateuch. It contains portions of an older document, which from the stress laid by it on the idea of holiness, is called H. Large portions of Leviticus xvii.–xxvi.; are taken from H. In this combined priestly and holiness document are found many laws, some of which may be old; but all or nearly all are now couched in the style of priestly narrators. Finally JED and P were combined into the present

Hexateuch, some slight alterations being made by editors or harmonists.

As this account is, owing to the nature of the subject-matter, necessarily very vague, it will be desirable to add a little more precision to our ideas of the critical position by putting some of its aspects in another way. It is not suggested by the critics that in the Pentateuch we have a post-Mosaic narrative, which incorporates the laws and speeches of Moses in the language in which they were delivered ; nor is it said that we have here a history written by a late author in his own style, the facts being, as in the case of a modern historian, derived from earlier sources. On the contrary, the critical view is that we have a number of excerpts from different documents, and that, subject only to certain minor modifications, the language of these documents is in every case preserved. Moreover, though some laws may be Mosaic, it is said that various legal provisions conflict in a manner which would not be possible if they were all due to the same legislator ; and this difficulty is met by a theory which is known as the development hypothesis. The supporters of this view say that each one of the main groups of laws, those of JE, D, and P (including H) respectively, is the product in its present form of different social and religious conditions, that each is adapted to the needs of the age in which it originated, and that the inconsistencies are due to the fact that each group of laws represents an attempt to grapple with the problems of a different age.

In examining this theory, it will be convenient to place before my readers a series of extracts from critical authors, so that, where possible, the reasonings of the members of this school may be given in the language of representative writers. As a rule I shall use two works. The first of these is called "The Hexateuch according to the Revised Version, arranged

in its Constituent Documents by Members of the Society of Historical Theology, Oxford ; Edited with Introduction, Notes, Marginal References, and Synoptical Tables by J. Estlin Carpenter and G. Harford-Battersby (1900, Longmans Green, & Co)."¹ It is stated in the preface to this work that it is intended to place before English readers the principal results of modern inquiry into the composition of the first six books of the Old Testament. As the analysis is the work of a committee, this book may be considered to possess a representative character. Secondly, I shall use Dr. Driver's Commentary on Deuteronomy in the International Critical Commentary. Dr. Driver is a critical professor of recognised eminence, so that his work too may fairly be regarded as representative. But to avoid all possibility of hurting the religious feelings of any of my readers, I shall, in these extracts, substitute the LORD for the various transliterations of the Name that are used in the original books. So far as regards the legal evidence nothing turns on the use of any appellation of God.

The first argument from the jural laws is stated thus :—

The first code, Exodus xxi. 1-6, permits a Hebrew after six years' service to contract for life-long servitude, and places the ceremony of formal enslavement under religious sanction. Before Israel has left Sinai, however, in the next year, this arrangement is tacitly abrogated. In Leviticus xxv. 39-42, it is laid down that no Israelite shall sell himself to another ; temporary slavery may, indeed, last till the jubile ; but the poor "brother" is entitled then to liberty for himself and his family, 41 (in Exodus xxi. 4 the wife and children remain in the possession of the master), on the express ground that their freedom was a divine gift and could not be alienated by slavery for life. That is the exalted view of the second year after the Exodus. But at the end of the wanderings, thirty-eight years

¹ This will be referred to as "The Hexateuch."

later, Moses returns to his earlier scheme. In Deuteronomy xv. 12 . . the theory that every Israelite is the LORD's bondman is quietly abandoned, and the process of voluntary enslavement in the seventh year is again legitimated. It cannot be said that the intervening law had been tried without success, for it was expressly designed, Leviticus xxv. 2, for the settlement in Canaan. Yet it is wholly ignored when Moses makes his final address, and an arrangement entirely inconsistent with it is re-enforced. The conflict of principle is here as clear as the conflict of fact in the case of the position of the sacred tent or the construction of the ark. It will hereafter be suggested that the three laws belong to three different stages of religious and social order. At present it must suffice to observe that if the law of Exodus or Deuteronomy is Mosaic, then that of Leviticus is not, and vice versa ["The Hexateuch," I. 31; cf. Driver, Deuteronomy xxxix].

The text of Leviticus xxv. 39-42 is as follows :—

39. And if thy brother be waxen poor with thee, and sell himself [*or* be sold] unto thee ; thou shalt not make him to serve as a bond-servant :

40. As an hired servant, and as a sojourner, he shall be with thee ; he shall serve with thee unto the year of jubile :

41. Then shall he go out from thee, he and his children with him, and shall return unto his own family, and unto the possessions of his fathers shall he return.

42. For they are my servants, which I brought forth out of the land of Egypt : they shall not be sold [*or* sell themselves] as bondmen.

I shall show that this law does not affect any case of *de jure* slavery,—“thou shalt not make him to serve as a bondservant”—but is intended to control the operation of a well-known ancient result of insolvency, whereby the debtor and members of his family were reduced to *de facto* slavery. The rules here laid down would benefit only free Israelites, who sold themselves through insolvency, and perhaps also—but this is doubtful—children sold by their parents on account of poverty.

It must be remembered that up to the end of the Biblical period, we are dealing with a slave-owning society, so that all sane men of ordinary knowledge and intelligence must have had at least a superficial knowledge of the principal methods of acquiring a slave. Bearing this in mind, we may proceed to apply to the interpretation of the law the methods by which in practice, the meaning of laws is elucidated in every country and in every age. Would this law benefit a Hebrew who was born a slave? Obviously not: its operation is limited in terms to the case of a man, who is "waxen poor with thee," and is therefore sold—whether by himself, his father, or his creditors, is for this purpose immaterial. How could any slave wax poor? Again, it does not appear that this law would apply to an Israelite, who had become a slave by capture in war, and had subsequently come on the slave market, to the needy thief,¹ who was sold under the provisions of Exodus xxii. 3, or to the daughter, whom her father had sold as a slave wife. No doubt, but for the express limitation of the law to the free Israelite, who *de facto* lost his freedom through poverty, it might be thought that the principle "they are my servants" would cover all Israelites, but a single illustration will suffice to show that this too must have had limitations. The needy thief could surely not have urged this to prevent his

¹ It used to be thought that the needy thief of Exodus did fall within the scope of the jubile law. This view is untenable for the following reasons: First, it is directly contradicted by the language of both laws. Secondly, such a construction would have worked the most arbitrary injustice. A poor man, who stole a sheep six years before the jubile, would have to endure six years' slavery, whereas, for exactly the same offence, committed three years later, he would get off with half the penalty. Thirdly, such a law would have acted as a direct incentive to poor men to steal, when the jubile was sufficiently near to render the punishment insignificant. We of course reach exactly the same result, if we look at the matter from the point of view of the owner, whose property had been stolen, and who was to be compensated by the price realised by the sale of the thief; for the price would necessarily vary with the proximity of the jubile.

being sold as a slave. Indeed, to whatever date this law be assigned, we are always prevented from giving too wide a construction to the principle by the fact that the operative words do not cover all cases of property in human beings, or even all purchases of services that were *de facto* or *de jure* servile, but are limited to the single case of the sale of a free man. In fact, this enactment is not a slave law at all. It is a measure for the relief of insolvent Israelites, and the principle "they are my servants" refers only to freemen who have committed no wrong. As the children of Israelites were also Israelites, we perhaps get glimpses of the class of cases for which this law was intended in 2 Kings iv. 1, where the widow says to Elisha :—

The creditor is come to take unto him my two children to be bondmen,

and in Nehemiah v. 4 and 5, where we read :—

4. There were also that said, We have borrowed money for the king's tribute upon our fields and our vineyards.

5. Yet now our flesh is as the flesh of our brethren, our children as their children : and, lo, we bring into bondage our sons and our daughters to be servants, and some of our daughters are brought into bondage already : neither is it in our power to help it ; for other men have our fields and our vineyards.

It would be difficult to offer any more illuminating commentary on the purview, spirit, and importance of the whole group of laws contained in this chapter, than is supplied by the following extracts from a standard work on Roman law :—

The tumults and seditions so frequent in Rome during the first two centuries of the republic, are more frequently attributed by the historians to the abuses of the law of debt than to any other cause, social or political. The circumstances of the poorer plebeians were such as to make it almost impossible to avoid borrowing. Their scanty means were dependent on

the regular cultivation of their little acres, and on each operation of the agricultural year being performed in proper rotation and at the proper season. But this was every now and again, interfered with by wars which detained them from home at seed-time or harvest, practically rendering their farms unproductive, and leaving them and their families in straits for the commonest necessities of life. A poor peasant, in such a case, had no alternative but to apply to a capitalist for a loan either of corn or money. But it was not to be had without security, and rarely without interest. It was not that the lender doubted the borrower's honesty and willingness to repay his debt; it was rather that there was every chance that next year a fresh war might again interfere with the latter's agricultural operations, leave him again without a crop, and thus render repayment impossible. And so, while interest accumulated and was periodically added to capital, new loans had year after year to be contracted as long as any acres remained that could serve as a security; failing all things, the debtor had to yield himself to his creditor in *de facto* servitude. This was a result of the transaction with the copper and the scales, technically known as *nexum*, whose origin has already been referred to. It was bad enough at the best, but horrible in its abuse. For, not content with the slave's work he exacted from his debtor, the creditor too often put him in chains, and starved him and flogged him, as if really and truly a slave instead of still a Roman citizen. . . . To such a height did the system grow, that often those free bondmen might be reckoned by thousands, and that the saying was almost justified that every patrician's dwelling had become a private prison-house. . . . According to Livy, it was the sight of one of those wretched *nexi*, and the tale he told his old comrades of the sufferings he had endured, that was the immediate incitement to the first secession. The establishment of the tribunate was its great constitutional result. . . . The same enactment, however, that created the tribunate . . . contained a provision that to many must have been even more welcome,—that all debts were to be remitted and all *nexi* to be liberated. This, if not actually the first, was at all events a forerunner of a long series of enactments for ameliorating the position of those who had been obliged to borrow money and by no fault of their own were unable to repay it. There were laws to repress usury: for example, a provision of the XII Tables

making the *unciarium fenus*—i.e. one-twelfth of the capital, or 8½ per cent yearly—the maximum rate, and imposing a fourfold penalty on its contravention. . . . And there were enactments remitting debt on terms that were ever varying. . . . Finally came the Poetilian law . . . Its occasion, purpose, and effect have been subjects of much discussion, and will be referred to in describing the contract of *nexum*,—the transaction whereby a borrower gave his creditor the right to apprehend him on his failure to fulfil his obligation of repayment, and, without any process of law, carry him home and detain him, and employ his services as *de facto* (though not *de jure*) a slave. This apparently was the extent of the creditor's right, depending on consuetude rather than statute. But it had become frightfully abused; their *jus detinendi* being regarded by creditors not as affording them the means of obtaining through their debtor's industry substantial satisfaction for their pecuniary losses, but rather as entitling them to inflict as punishment every sort of cruelty and torture and indignity. It was recognised that nothing less would suffice than the total abolition of the *nexum* as a contract between lender and borrower. It was a serious matter . . . but no half measures would do; . . . all the then *nexi* were liberated, and nexal contract forbidden for the future. [Professor Goudy points out that the statute did not actually forbid the contract, but deprived *nexum* of all its advantages in execution, so that it fell into desuetude, p. 92 n.]

This could not, of course, obviate the necessity for or the practice of borrowing. . . . It was only by the Julian *cessio bonorum* . . . which entitled a debtor to his discharge on formally giving up everything to his creditor, that the position of insolvents was really greatly ameliorated, and their confinement or incarceration avoided [Muirhead: "Historical Introduction to the Private Law of Rome," 2nd edition, § 20, pp. 89–93].

It may be added that we find instances in Babylonian contracts of freemen pledging their freedom (Kohler und Peiser, *Aus dem Babylonischen Rechtsleben*, iv. 47), and that the code of Hammurabi contains the following provisions:—

If a man a debt has seized him, and he has given his wife, his son, his daughter for the money, or has handed over to

work off the debt, for three years they shall work in the house of their buyer or exploiter, in the fourth year he shall fix their liberty [§ 117].

. . . If that man before he married that woman had a debt upon him, the creditor shall not seize his wife [§ 151].

Genesis xlvii. 13-26 also affords a valuable commentary on the land and jubile laws.

Other illustrations will be found collected in that chapter of Grote's "History of Greece," in which he describes the Athenian law of debt and the Solonian *Seisachtheia* [Part II. chapter xi.].

Once it is recognised that the Leviticus enactment is in fact a measure for the relief of free insolvent Israelites, and belongs to a different department of law from that which deals with slaves, all minor difficulties disappear. We see how it is that the freeman is never contemplated as desiring to stay with his purchaser, though the slave is regarded as possibly unwilling to leave his master, why the former on his release has property, while the latter has none, why the position of the respective families is so different, why we find this law placed with land laws and measures that would benefit poor peasants.

It is noteworthy that this law was obviously expected to benefit especially—even if not exclusively—the landowner, for it speaks of the person affected by it as returning to the possessions of his fathers. Now, the jubile legislation only affected land outside the cities, so that a townsman who had become insolvent and lost first his property and then his freedom, could have no possessions to which to return. Moreover, this very passage by implication recognises hired servants, who presumably were not landowners, and all the documents of the critics recognise inequalities of wealth and rank. How comes it that no provision is made for the relief of dwellers in towns and landless freemen?

The answer to this question will afford the solution of some of the difficulties which have made it possible for the following passage to be written.

It is to be found on pp. 54 and 55 of the first volume of "The Hexateuch."

Another interesting illustration of this divergence is to be noted in the social arrangements for the relief of the poor. The first series of Covenant-words, Exodus xxiii. 10, enforces on the land the principle of a sabbatical "release." Every seventh year it is to lie fallow, the vineyard and oliveyard being treated in like manner. The spontaneous produce was not to be collected by the owner; it was to be reserved for the poor; and anything which they might leave was abandoned to the "beast of the field." The Deuteronomic law is silent about the land. But it applies the same principle under the name of the "year of release" to debts (xv. 1 . . .). In the legislation of Exodus it does not appear clear whether the observance would be uniform over the whole country, or whether differing districts or even different holdings, might follow their own septennates. But D provides that "the LORD's release" shall be publicly proclaimed (2), and it covers all cases, therefore, alike. Its precise scope, however, is difficult to determine. Did the creditor permanently forgo all claim upon the debtor, or did the "release" only suspend his rights for twelve months? The legal and archæological bearings of this question need not be here discussed. They are only of importance in so far as they concern the inquiry whether these two laws issued from the same hand, or whether they do not represent two separate efforts to provide help for the suffering poor, corresponding to different stages of social development. This argument may be reinforced by a consideration of a kindred law in Leviticus xxv. Without employing the term "release," it is ordained that every seventh year the land shall "keep sabbath to the LORD" (2). The poor, indeed, are not in the author's view. Attention appears to be concentrated on the value of the sabbatical observance. Contrary to the implied provision of Exodus xxiii., the householder is himself to gather in the produce, and he and his labourers, bondmen and hired, may all enjoy it together. On the basis of this periodic rest, however, a further institution is established. After seven sabbaths of years the fiftieth shall be hallowed (10), and liberty shall be proclaimed

throughout the land. Bondmen will regain their freedom, and land that has been sold shall go back to its ancient proprietors. The religious theory underlying this arrangement asserts (23) that the sole ownership is vested in the LORD; the land cannot therefore be perpetually alienated by the tenants whom he has placed upon it, for it is not theirs to sell. The connection of this law in its present form with the Levitical calendar is indicated by the rule that the trumpet which announces the advent of the jubile, shall be sounded through the country on the day of atonement (9). Is it not clear that the "release" of Deuteronomy xv. and the "liberty" of Leviticus xxv. lie in different planes, are founded on different social theories, and are animated by different religious conceptions? [*Cf.* Driver, Deuteronomy xxxviii].

I gather that the essential points are (i.) that it is inconceivable that the Sabbath year law of Exodus should be by the author of the "release" law of Deuteronomy; (ii.) that the law of Leviticus is contrary to an "implied provision" of Exodus; and (iii.) that the "release" of Deuteronomy and the liberty of Leviticus must also be from different hands.

It will be best to clear the ground by disposing of the second point first, namely, that the law of Leviticus is contrary to "an implied provision" of the Exodus law.

The text of Leviticus xxv. is:—

2. . . . When ye come into the land which I give you, then shall the land keep a sabbath unto the LORD.

3. Six years thou shalt sow thy field, and six years thou shalt prune thy vineyard, and gather in the fruits thereof;

4. But in the seventh year shall be a sabbath of solemn rest for the land, a sabbath unto the LORD: thou shalt neither sow thy field, nor prune thy vineyard.

5. *That which groweth of itself of thy harvest thou shalt not reap, and the grapes of thy undressed vine thou shalt not gather:* it shall be a year of solemn rest for the land.

6. And the sabbath of the land shall be for food for you; for thee, and for thy servant and for thy maid, and for thy hired servant and for thy stranger that sojourn with thee; and for thy cattle, and for the beasts that are in thy land, shall all the increase thereof be for food.

The whole of the above passage is attributed by the critics to one author. In the face of verse 5, it cannot be maintained that the allegation of "The Hexateuch" that "contrary to the implied provision of Exodus xxiii. the householder is himself to gather in the produce" is an accurate statement of fact.

We may best dispose of the other difficulties of the critics by explaining the true scope of the laws in question. We found that the jubile legislation was apparently intended to benefit the rural landowner, but left untouched a number of other cases such as those of the townsman and the landless freeman. When, therefore, we find Exodus xxiii. 11, expressly laying down a certain agricultural regulation "that the poor of thy people may eat," we see at once that it is intended to benefit persons in the country who have no land. In particular, we notice that it affects cases of a class quite distinct from those falling within the purview of the law of debt. No doubt persons who were in debt might often benefit by such a rule, but it would clearly be of advantage primarily to other classes of the community, such as wandering strangers, poor unemployed freemen, or persons in the position of Ruth and Naomi.¹ So far Exodus and the jubile legislation are complementary, not contradictory. But the scheme is incomplete. There still remains the problem of how poor townsmen were to be relieved. The struggling artisan or merchant would not derive much advantage from either of the measures we have considered. Hence

¹ To complete our view of the measures for the benefit of this class, references must be added to three other passages.

Leviticus xix. 9, 10, contains commandments which favour gleaning. In Leviticus xxiii., which contains a sort of religious calendar, these are repeated in an abridged form in their proper chronological place,—*i.e.* at harvest time [22]. Deuteronomy xxiv. 19–21 contains similar directions, grouped with other commandments for the benefit of the stranger, the fatherless, and the widow. How consonant such provisions were to the genius of the Israelites may be seen from the book of Ruth.

in Deuteronomy we find a law providing for a septennial release.

And this is the manner of the release: every creditor shall release that which he hath lent unto his neighbour; he shall not exact it of his neighbour and brother [Deuteronomy xv. 2].

How can anybody reading the plain language of the Pentateuch confuse the Deuteronomic release of *loans* with the Levitical liberty for *inhabitants*, or imagine that either is in any way inconsistent with a regulation for letting land lie fallow?

We have seen that the jubile law is contemplated as being beneficial to rural landowners; it is interesting to note that in fact the Deuteronomist appears to expect the law of release to operate to the advantage of dwellers in cities. "If there be with thee a poor man, one of thy brethren, within any of thy *gates*" is the language of Deuteronomy xv. 7, while the provisions of the jubile law as to land apply to the country and the villages which have no walls round them, but not to the walled cities (Leviticus xxv. 30, 31), which alone could have gates. What is the reason for this contemplated difference in the operation of the two laws? It is, of course, impossible to be certain of the exact construction that contemporaries would put on their provisions, and we must not overlook the possibility that on the true construction the one would have been limited to dwellers in the country, and the other to inhabitants of towns; but, if this were so, it would only lead to the same question being put in the modified form: "Why should it be desirable to have different laws for the two cases?" Is there any inherent difference in the conditions of town and country life such as would necessitate a difference in the laws intended to govern them? The thoughts of

lawyers and business men instinctively turn to the question of security. A small farmer would have all the qualities necessary for a useful agricultural labourer, so that a man who lent money to a peasant on the terms that, failing repayment within a fixed time, he was to have the borrower's services as a labourer till the year of the jubile, would have some security for his money. On the other hand a merchant or artificer would be of very little use either in the fields or in the house. Hence, to arrange that such a person should serve as a hired labourer in default of repayment, would simply be to kill a goose that might lay golden eggs. Possibly his children, if sufficiently young, might be taken till the year of the jubile, when they would return to their family, but not the man himself.

The critical treatment of the passages we have considered is a very instructive instance of the necessity for legal training in those who would deal with law. We find here entirely different institutions, bearing different names—jubile, release, sabbath of years—intended for different purposes, governed by different rules. Nevertheless the critics confuse them all hopelessly. Laws regulating the Hebrew equivalent of the Roman *nexum* are confused with laws that deal with ordinary loans; both are then confounded with rules of agriculture and provisions for relieving the poor in rural districts. Yet there has never existed a society in which every pauper was a borrower, every debtor was insolvent, every loan was secured, every poor man was a farmer.

The Hexateuch's chapter on the order of the documents argues that the priority of D to P "is further implied in the regulations for the priestly maintenance." After dealing with various religious institutions it proceeds:—

The Levitical demands appear to have been formulated originally on the theory that the Levites had no inheritance in the land, Numbers xviii. 20; *cf.* Deuteronomy x. 9. But one immense benefaction remains to be mentioned. The regulation contained in Numbers xxxv. 1-8, contemplates the endowment of the order with forty-eight cities and measured pasture-lands around. It does not seem likely that any priesthood would have submitted voluntarily to the curtailment of their privileges involved in the view that P was really anterior to D. If the priestly revenues had been so carefully provided, and so clearly defined, how is it that the poor Levite of the homestead is represented as dependent on the householder's charity, and is grouped with the destitute and forlorn? Must it not be conceded that the higher demands of the Priestly Code constitute a more advanced claim, so that in this matter as in others D occupies the middle place between JE and P? [I. 78].

On pp. 76-77 it has already been argued that the Deuteronomic legislator identified the priests and the Levites.

The higher critics appear to attach great importance to arguments drawn from the real or supposed silence of the texts with which they deal. Consequently it will be well to quote what Dr. Driver says on this point.

In the laws of P in Leviticus and Numbers a sharp distinction is drawn between the priests and the common Levites: in Deuteronomy it is implied (xviii. 1a) that *all* members of the tribe of Levi are qualified to exercise priestly functions; and regulations are laid down (xviii. 6-8) to meet the case of any member coming from the country to the central sanctuary, and claiming to officiate there as priest. Moreover, in P particular provision is made for the maintenance of both priests and Levites, and in Numbers xxxv. (*cf.* Joshua xxi.) forty-eight cities are appointed for their residence. In Deuteronomy, under both heads, the provisions are very different . . . Deuteronomy xviii. 6 is inconsistent with the institution of Levitical cities prescribed in Numbers xxxv.: it implies that the Levite has no settled residence, but is a "sojourner" in one or other of the cities of Israel. The terms of the verse

are indeed entirely compatible with the institution of Levitical cities, supposing it to have been imperfectly put in force; but they fall strangely from one who, *ex hypothesi*, had only six months previously assigned to the Levites permanent dwelling-places. The same representation recurs in other parts of Deuteronomy: the Levites are frequently alluded to as scattered about the land, and are earnestly commended to the Israelite's charity ["Literature of the Old Testament,"¹ 82-83; Deuteronomy xxxviii.-xxxix. to much the same effect].

A reference to the passage in question shows that the very law which is "inconsistent with the institution of Levitical cities," and which "implies that the Levite has no settled residence," goes on to recognise the Levitical cities or something very like them.

They shall have like portions to eat, beside that which cometh of the sale of *his patrimony* [verse 8].

What was this "patrimony"? As the Levites had "no portion nor inheritance with Israel" the "patrimony" must presumably have been something specially reserved for them. But this is by no means all. The words of the prophet in whose days the critics say that the Book of Deuteronomy was discovered, open with the title:—

The words of Jeremiah the son of Hilkiah, *of the priests that were in Anathoth* in the land of Benjamin.

In the very same edition of the book from which I have already quoted Dr. Driver accepts the statement of the title as historical, and refers to 1 Kings ii. 26 and Joshua xxi. 18 (that is, P) in its support ["Literature," 247]. He at any rate must therefore be regarded as admitting the historical nature of the statements there made. It would be interesting to know how he would reconcile this with his allegation on p. 219 of his Deuteronomy that—

¹ "An Introduction to the Literature of the Old Testament," sixth edition, 1897.

In Deuteronomy they [*sc.* the priests.—H. M. W.] are a *fluctuating* minority, viz. those members of the tribe who are officiating for the time at the central sanctuary.

But the matter can be placed beyond all doubt by a reference to Jeremiah xxxii., where the prophet buys a field in Anathoth from his cousin (who must also have been a priest) in accordance with the right of pre-emption. This makes it certain that the priests had landed property in the days of Jeremiah, and it will hardly be argued even by those who place Deuteronomy in the reign of Manasseh that this was only a few years old. The critics are therefore face to face with a dilemma: if the Levites were identical with the priests, they must have had landed property; if they had no landed property, they were not identical with the priests.

It is probable, too, that few critics would be prepared to maintain that when Jeremiah says that he was one of the *priests* in Anathoth, or refers to *e.g.* Maaseiah, the *priest*, he means in each case *Levite*. But, unless they are prepared to maintain some such thesis regarding *every* genuine instance of the use of the word "priest" before and contemporaneously with the date to which they assign Deuteronomy, what becomes of their argument from the alleged identification of priests and Levites?

A few minutes' reflection suggests that any writer who was not singularly tautologous, would hardly be likely to make repeated use of the phrase "the priests, the Levites," still less to add the words, "the whole tribe of Levi," if any one of the three expressions would suffice. Following up this line of thought, we notice that in other parts of the Pentateuch frequent mention is made of "the priests, the sons of Aaron," and that the Deuteronomist himself sometimes uses the simple terms, "priest" and "Levite." Is it not a necessary inference that the word "priest" had in fact both a

specific and a generic sense, and that, in speaking to the people, the Deuteronomist was careful to use terms, which would prevent any possible ambiguity from arising in the minds of his hearers?

Mention may here be made of one small difficulty which the critics have not observed. Leviticus xxv. 34, prohibits the sale of the fields of the Levitical cities; yet Hanamel sells a field in Anathoth. It may be that this law had become a dead letter, but it is also possible that it was merely intended to prohibit sales out of the family, and not to prevent a tenant for life from selling his life interest to the person next entitled.

We must now return to Dr. Driver's citations from the historical books. The passage to which he refers in the first book of Kings, chapter ii., is as follows :—

26. And unto Abiathar the priest, said the king, Get thee to Anathoth, unto thine own fields; for thou art worthy of death: but I will not at this time put thee to death, because thou barest the ark of the Lord God before David my father, and because thou wast afflicted in all wherein my father was afflicted.

Whatever may be said of the date and composition of the historical books, one thing is very obvious, viz., that no literary forger would have invented a reference of this kind to Anathoth had not Abiathar in fact been connected with the place. We are therefore safe in saying that as early as the reign of Solomon "priests" had property in Anathoth. But the next verse throws a little more light on our difficulties :—

27. So Solomon thrust out Abiathar from being priest unto the LORD.

So we come to this; there were persons connected with Anathoth, who were called priests, but the word "priest" is also used of an official, who performed certain functions in Jerusalem, and it is possible to

speak of a man as being thrust out from being "priest" unto the Lord, and yet to call him one of the "priests" that were in Anathoth. Perhaps Dr. Driver's other reference may help us a little further.

On turning to Joshua xxi., which the critics attribute to the post-exilic P, we find a description of how certain cities were given to the Levites. These of course are the forty-eight cities of the Pentateuch. The first thing that becomes obvious is that Dr. Driver has failed to grasp the necessary results of the documentary theory. If we are to say that Deuteronomy is inconsistent with P, because it does not recognise the Levitical cities, and that it was only at a later date that the priests bethought themselves of making this "demand," we must also say that at the date when Deuteronomy was written, the Levites neither had nor ever had had any such property. We must therefore declare the whole of this chapter of Joshua to be an impudent fabrication, because, at the time when it was written, it must have been matter of common knowledge that the Levites never had had forty-eight cities, and the details of the description were utterly inconsistent with notorious facts. In considering this point, we may for the sake of clearness confine ourselves to the case of Anathoth. In the verse to which Dr. Driver refers [Joshua xxi. 18], we are told that Anathoth was given to the children of Aaron. Now, in Ezra ii. we find a catalogue of those who went up out of the captivity and returned into Jerusalem and Judah, every one unto his city, and in this catalogue we read "the men of Anathoth, an hundred twenty and eight" [verse 23]. It was therefore well known in post-exilic times who the men of Anathoth in fact were, and it must have been equally well known whether they were Levites or not. Can we conceive that this chapter of Joshua could have been written if it was notorious that the men of Anathoth were not Levites? And if it had

been written, would it ever have been accepted as true? And the reasoning that holds good of Anathoth is equally applicable to the other cities specified in this chapter.

Once more, this chapter of Joshua distinguishes between the children of Aaron, to whom certain cities were given, and the other Levites to whom other cities were given—Anathoth, for instance, being assigned to the former. Now in Ezra ii. 62 we read in connection with certain children of the priests :—

These sought their register among those that were reckoned by genealogy, but they were not found : therefore were they deemed polluted and put from the priesthood.

In the face of this passage, which shows with what care the genealogy of members of the priesthood was preserved and examined, can it be supposed that a writer in sympathy with the ideas of the priests could have stated that certain cities were given to the children of Aaron, unless the genealogical records in fact supported the view that the inhabitants of these cities were descended from him? Yet this is what the documentary theory requires us to believe.

I have examined these passages in detail, partly because *pro tanto* they throw light on the character of the historical books, partly because they suggest the idea that there is historical evidence of the date of the Pentateuch, and that it has never been examined by any writer who has been trained to weigh such evidence.

In Exodus xxi. 13, the asylum for manslaughter (as the connection with v. 14 appears to show) is the LORD's *altar* (*cf.* 1 Kings i. 50; ii. 28); in Deuteronomy (chap. xix.) definite cities are set apart for the purpose [Driver, Deuteronomy xxxvii].

Exodus xxi. 13 and 14, is as follows :—

13. And if a man lie not in wait, but God deliver him into his hand ; then I will appoint thee a place whither he shall flee.

14. And if a man come presumptuously upon his neighbour, to slay him with guile; thou shalt take him from mine altar, that he may die.

It is submitted that no unprejudiced person would first identify the "place" of verse 13, which is to be appointed in the future for the *manslayer*, with the "altar" of the very next verse, from which the *murderer* was to be taken, and then argue that this law was inconsistent with the institution of cities of refuge. It is only fair to note that Dr. Driver states the point with obvious doubt.

Dr. Driver makes a point on the law of seduction [Deuteronomy xxxvii. xxxviii.], but as he refers to Professor W. Robertson Smith as his authority, and the latter treats it most fully, it will be best to quote the earlier writer, merely observing that he refers to the Exodus source as S.

Again, in Exodus xxii. 16, 17, he who seduces a virgin is obliged to buy her of her father as his wife, or if the father refuse he is to pay the same dowry as if he had married her a virgin. We have here an example . . . of a state of society well known to students of antiquity. The father has a pecuniary interest in his daughter's virginity, because he expects to receive a dowry or rather purchase price (*môhar*—exactly equivalent to the Homeric *ἐὶδνα*) from the suitor in exchange for her hand. The seduction frustrates this hope (*comp. Odyssey viii. 318*), and the seducer must therefore make good the injury to the father as well as to the damsel. In accordance with this point of view, the law of S stands at the close of a list of cases of pecuniary compensations for injury to property, and not among the laws as to personal injury. In Deuteronomy xxii. 28 we find a parallel law—not among laws of property, but among laws as to purity. The case contemplated is not that of seduction, but of violence to a maiden. It is still provided that the offender shall marry the damsel and pay a sum to the father; but the expression "*môhar* of virgins" has disappeared, and the compensation is fixed at fifty shekels. Apparently the custom

of paying a dowry to the father in every case of marriage is no longer known, and therefore, though the fine is retained, it cannot, as in S, be estimated by usual practice as to the dowry of virgins, but requires to be fixed by law. When this important change in marriage customs took place we cannot say with precision. In the time of Saul the payment of a *môhar* was still usual (1 Samuel xviii. 25); but the book of Kings has a technical word for dowry given by the father to his daughter (*shillûchim*, 1 Kings ix. 16, literally "dismissal gift"), which implies a reversal of the old custom. In the post-Biblical Jewish law the dowry was settled on the wife, as well as the paraphernalia which she brought from her father's house [W. Robertson Smith. Additional answer to the Libel, 56-57].

A pretty theory, but one which rests entirely on the hypothesis that in no country can the custom of giving dowry co-exist with the custom of paying the father for his daughter. It is therefore a complete answer to point out that in Babylonia these two customs did so co-exist (Kohler und Peiser, *Aus dem Babylonischen Rechtsleben*, I. pp. 7, 8).

It should, moreover, be noticed that both the passages in the historical books relate to very exceptional cases. In the first citation, a subject desires to marry the daughter of his sovereign; while in the book of Kings, it is the king of Egypt who captures and burns Gezer, slays the Canaanites that dwelt in the city, and gives it for a portion unto his daughter, Solomon's wife. We may wonder whether such a use of historical material would be tolerated in any other field of inquiry. What would be said of a group of historians who should, for instance, point to the fact that, when Katharine of Portugal brought Bombay and Tangier as a portion on her marriage with Charles II., the English language had an apt term to express this, and should solemnly argue that the English law and custom of Dower must therefore have died out before 1660, and that the Eng-

lish marriage customs had undergone an important change?

As to the differences between the laws of Deuteronomy and Exodus, the explanation cannot be better given than in Professor Smith's own words: "The case contemplated is not that of seduction, but of violence to a maiden." In law, different premises habitually lead to different conclusions.

A smaller divergence between the modes of effecting the contract for family bondage may be now made clear. The Judgement-book, Exodus xxi. 6, ordains that the master shall bring his slave "to God"; there at the door of the sanctuary, the centre of the administration of justice, the master shall bore his ear through with an awl, affixing it momentarily to the door-post, so that under the authority of religion he becomes a slave "for ever." The corresponding law in Deuteronomy xv. 12-18, introduces some interesting modifications. It is extended to women; it lays emphatic stress on generous recognition of the six years' forced labour; and in conclusion it retains the symbolic action with the awl. But it omits all reference to "God." The door-post to which the slave is attached is that of the householder's own dwelling. The public and official ceremony is converted into a private and domestic incident. The meaning of this change is not obscure. The law of Exodus belongs to the code which admits a plurality of sanctuaries: the Deuteronomic principles recognise but one. Important ceremonies, like the annual festivals, are transferred to the only centre of worship. There, too, must tithes be consumed (xiv. 23 . . .), an express provision being inserted for those who lived too far off to take their tithes thither in kind. The case of the household slave, however, was not important enough to require the intervention of the supreme authorities in the capital, and the reference to justice and religion dropped ["The Hexateuch," I. 55-56; cf. Driver, Deuteronomy 184].

Nobody would infer from this that the translation "God," on which practically the whole of the above rests, is only an admittedly doubtful rendering of אֱלֹהִים, a word which is by some translated "judges."

The critics, having obtained the curious phrase "go to God"—a phrase better suited to idolaters than to the God of the Decalogue or a law-giver who worshipped Him—promptly substitute "the sanctuary" for "God." But the change is fatal. It is true that we meet with a number of erections which the critics term "sanctuaries," but what were these sanctuaries? Not buildings, but altars—that is, structures, which, whatever their merits as places of worship, would not possess the one essential for this ceremony, a door or door-post. And what a curious transaction it is! A "sanctuary" we have, but no priest, no congregation, no sacrifice, no ceremony, religious or other, merely this pinning of the slave's ear to the imaginary door or door-post. Is there any parallel to this in the legislation of the Pentateuch? And could this extraordinary proceeding serve any useful purpose?

Now let us try substituting "judges" for "God." Master and slave go to the judges. Where do the judges meet? Not at the notional door of a hypothetical "sanctuary," but at the gate (Deuteronomy xxi. 19, xxv. 7; Joshua xx. 4; Ruth iv.; Zachariah viii. 16; *cf.* 2 Samuel xv. 2-6; Genesis xxiii. 18), which will certainly provide the necessary door and door-post, even though the adjoining wall may be of some material which would not lend itself to the ceremony. What happens? The slave publicly, in the presence of the very judges who would have to try the question of fact should any dispute hereafter arise, submits to having an indelible mark, which will always be evidence in case of any dispute, made on that part of his body where it will do least harm. If he should hereafter say, "True, I have this mark, but it was made without my consent," the knowledge of the judges will decide the issue. If all the judges be dead, yet, as the ceremony was public, there will be the maximum probability that some witness of

it will survive who can prove what he saw. The ceremony may of course also have some archæological or symbolical meaning, but it is impossible to feel any doubt as to its legal and practical aspects. It is in accordance with all we know of the ceremonies of ancient law before the introduction of the properly authenticated writing, which, in a more mature system, provides the necessary evidence. In all ancient systems of law we find the same need for evidence giving rise to the same publicity, for the question of proof has to be faced in every age. The Pentateuch knows nothing of written documents properly witnessed and authenticated by the signatures or seals of all the parties to the transaction. Writing it knows—we meet with it in the Deuteronomic law of divorce and in some of the covenant ceremonies. But in those very covenant ceremonies it is a mere adjunct to the ceremonies that we see in covenants which have no writing, and in no case is the writing authenticated as it would be in any mature system of law. The Israel of the Pentateuch has yet to pass through long ages of development before its law can embody the ideas which give rise to the Egyptian legal documents of the year 2500 B.C., the Babylonian legal tablets, the conveyance of the thirty-second chapter of Jeremiah, or the modern English deed. The historical student of law realises after the first glance at the legislation that the story of Dagon is about to find a literary parallel in the history of the documentary theory.

To return to the slave laws: when we look at the passage in Deuteronomy we find nothing about the door of the master's dwelling, only the phrase "the door." Can anybody doubt that every contemporary would have understood by this the door of the gate?

We may now deal with a further objection of Dr. Driver's:—

In Exodus xxi. 2-11 a Hebrew bondman is to serve for six years, and to receive his freedom in the seventh year

(verse 2); a bondwoman who comes into servitude with her husband is to receive her freedom at the same time (verse 3). But a daughter sold by her father as a bondwoman is on a different footing; she is not to go free as the bondmen do (verse 7). In Deuteronomy xv. 12 the law of Exodus, by the addition of "or an Hebrewess," is pointedly extended so as to include bondwomen; and in verse 17 it is expressly prescribed that the bondwoman (without any limitation) is to be subject to the same law of manumission as bondmen. Both laws are designed for the land of Canaan, as appears from the reference to the door and doorpost. If both laws, however, were given in the wilderness for a time of future settlement in Canaan, the variation just noted appears arbitrary. It is, however, at once explicable upon the supposition that the law of Deuteronomy springs from a more advanced stage of society than the law of Exodus, and regulates usage for an age in which the father's power over his daughter was less absolute than it had been in more primitive times, and when it was no longer the custom (see Exodus xxi. 8-9) for a Hebrew girl to be *bought* to be the wife of her master or his son [Deuteronomy xxxvii].

We may first strip this argument of the plausible air it derives from the hypothesis that the Deuteronomist is writing in an age when the father's power over his daughter was less absolute, and when it was no longer the custom for a Hebrew girl to be bought. The latter half of this theory has already been disposed of in dealing with Professor Smith's views as to the law of seduction. How erroneous is the view that the father's power had diminished may be seen by a reference to the passages quoted in dealing with the jubile law as to debtors, and also from Isaiah l. 1, where we read:—

Which of my creditors is it, to whom I have sold you?

Coming now to the actual law of Exodus, we find that it expressly excludes from the operation of the six years' principle only those women to whom it gives the benefit of a more liberal exactment (verse 11),

entitling them to the status and privileges of wives, or alternatively to immediate freedom. What was to happen in the case of other purchases of women? It would, of course, be easy to show grounds for thinking that the law of bond-servants is to apply to all purchases of women, other than those expressly excepted. Nobody would argue that a widow or a spinster could not take the benefit of the jubile law, because it applies in terms only to "thy brother." Nor would any one, who understood the spirit of this law, suppose that it was the intention of the legislator to provide relief for male slaves and for one class of female slaves, while leaving all other bondwomen without relief. So far, therefore, it matters not whether we suppose that the law is not confined to bondmen, or that during the forty years in the wilderness the question had been raised and settled, or that Deuteronomy actually does extend the law.

But when we look at Deuteronomy xv. other considerations arise. Here is the text:—

12. If thy brother, an Hebrew man, or an Hebrew woman, be sold unto thee, and serve thee six years; then in the seventh year thou shalt let him go free from thee.

13. And when thou lettest him go free from thee, thou shalt not let him go empty:

14. Thou shalt furnish him liberally out of thy flock, and out of thy threshing-floor, and out of thy wine-press: as the LORD thy God hath blessed thee thou shalt give unto him.

15. And thou shalt remember that thou wast a bondman in the land of Egypt, and the LORD thy God redeemed thee: therefore I command thee this thing to-day.

16. And it shall be, if he say unto thee, I will not go out from thee; because he loveth thee and thine house, because he is well with thee;

17. Then thou shalt take an awl, and thrust it through his ear unto the door, and he shall be thy bondman for ever. And also unto thy bondwoman thou shalt do likewise.

18. It shall not seem hard unto thee, when thou lettest him go free from thee; for to the double of the hire of an

hireling hath he served thee six years: and the LORD thy God shall bless thee in all that thou doest.

This is no judgment law, no rule intended to be enforced by the courts. The master is to let the man go free. Why? Because the courts will compel him? No, because "to the double of the hire of a hireling hath he served thee six years, and the Lord shall bless thee in all thou doest." "Thou shall furnish him liberally." Why? For fear of legal compulsion? Again, no, but because "thou wast a bondman and the Lord redeemed thee." And what is the gift to be? Some fixed amount of money or produce? Some quantity arrived at by judicial estimation. No, "as the Lord hath blessed thee, thou shalt give unto him." There is no right here that can be enforced, if necessary, by proceedings before the courts. Again, the law of Exodus provides for the possibility of children being born, the words of Deuteronomy do not even contemplate this contingency. In fine, the passage in Deuteronomy is not a jural law, but an exhortation addressed to the individual purchaser of slaves to observe with alacrity the already existing law, and to treat those whom it benefits with liberality. To obtain obedience, it relies not on any legal sanction, but on being a command of God and a term of a covenant, and on the inducements it holds out. It may therefore be used to interpret the law of Exodus, but cannot be treated as a fresh attempt to formulate a binding jural law.

There is one other point which should not be allowed to pass unnoticed. The reference to the door does not prove what Dr. Driver thinks. First, it is absurd to suppose that for forty years every slave who would otherwise have been entitled to freedom had to remain in slavery because, if he had desired to do so, no door

would have been available. Secondly, nobody who knows how institutions work in practice, will suppose that there can ever have been any difficulty anywhere in finding something that would have been a sufficient door within the meaning of the rule. Thirdly, the camp had in fact gates [Exodus xxxii. 26-27], and the tents had in fact doors [Exodus xxxiii. 8].

So far as I can gather, I have now exhausted the legal evidence on which the critics rely. It is therefore desirable to pause and sum up the results of our long inquiry. First, the development hypothesis is dead; for such a theory can only be supported by showing development, and no development has been shown. None can be shown. Secondly, the critics have entirely failed to point to any evidence either of composite authorship or post-Mosaic date. The phrase, "complementary not contradictory," represents the opinion that we have been led to form in considering the alleged inconsistencies, and such evidence of date as is afforded by the legal and historical passages we have examined, points to the Mosaic age. It is proper to emphasise this point by drawing attention to one of the arguments on which the critics rely.

The differences between Deuteronomy and Exodus 21-23, point with some cogency to a period considerably removed from that at which the Israelites took possession of Canaan, and presuppose a changed social condition of the people [Driver, "Literature," p. 87. *Cf.* Deuteronomy xlv].

Had this in fact been the case, the critics would have been able to point not merely to legal differences, but also to passages which presupposed a more advanced social condition than that of the Mosaic age. They have utterly failed in both respects. If the jural law is not Mosaic, how comes it that they are unable to adduce a single line of it as evidencing late composition?

But we have learnt far more than the real meaning of a few laws, or the weakness of the legal arguments for the documentary theory. We have learnt the characteristics and methods of this school of writers. Law is a technical subject, and probably not one of the critics would venture to dogmatise, without legal training, about the system of law at present in force in his own country in the positive manner in which they all make allegations about this difficult system of ancient law. Yet they are here dealing not with the law of their own country and age, but with the law of an early society, designed for archaic conditions, preserved in a dead language. And as with law, so with history. They profess to examine historical evidence, but we have seen that they do not understand how to handle it. What can such writers be expected to make of the other technical subjects on which they presume to write without expert qualifications?

Their lack of technical knowledge and training is, however, by itself insufficient to account for the uniform failure of these writers to construct any theory which will stand the test of examination. Writers on the military art tell us that if the strategy of a campaign be sound, the bad results of a lost battle will be minimised, but if the general plan of operations be false, even success in the field may bear poor fruits. A similar principle would seem to obtain in Biblical studies, and the collapse of the higher critics must be attributed in the first instance to their neglect of this principle. The true objective of Biblical students must always be the elucidation of the sacred Text, not its destruction.

But even the failure of the critics to construct any theory that will bear scrutiny is not the worst feature of their work. Nobody will question the excellence of their intentions; nobody will suggest that any critic would willingly be guilty of the slightest falsehood; but

can it fairly be said that the work we have examined shows that its authors possess the qualities of observing accurately and impartially, and reporting correctly the results of their observation? Putting aside all questions of technical training and of objective, what must be said of a group of writers, who, in the face of Leviticus xxv. 5, maintain that in Leviticus, "contrary to the implied provision of Exodus xxiii., the householder is himself to gather in the produce," or who assert that "Deuteronomy xviii. 6 is inconsistent with the institution of Levitical cities prescribed in Numbers xxxv?" Or what are we to make of the representations that the door of the sanctuary was "the centre of the administration of justice," and that in Deuteronomy "the door-post to which the slave is attached is that of the householder's own dwelling?" Can we think that the higher critics are likely to prove trustworthy, when they make allegations of fact about other subjects? Can we expect them to show even accuracy—I say nothing of acumen or insight—either in interpreting the texts with which they deal, or in grasping the practical working of the institutions about which they write?

The Mosaic date of the jural law is not in fact a matter for which we need rely on tradition, or speculation, or faith, or even on the express statements of the Pentateuch. It may be made the subject of rigorous proof. By that I do not mean that it is possible to produce a copy of the laws written by Moses, or that his handwriting could be proved if such a copy were available; but there the impossibilities end. It is easy enough to show, by means of the comparative method, that the topics dealt with by the laws are for the most part those dealt with by every early code, and that in all cases they are such as would naturally be subjects of legislation in the Mosaic age. The rules are in some cases actually identical with those found in other systems

of ancient law, and in all cases suitable to a primitive state of society. The method of legislation embodies very early conceptions, and in view of the evidence of other early laws, and the known characteristics of Hebrew literature, we can point to the very style as harmonising with Mosaic date. Indeed, to any reader of historical jurisprudence, the whole atmosphere of the Pentateuch is as familiar as the spirit is strange. Moreover, we have already seen grounds for thinking that history can show that the laws in fact operated, and it is not difficult to adduce other testimony from the later books.

If, however, that be so, what are we to say to the rest of the alleged evidence for the documentary theory? Nobody who has been trained in the law of evidence can feel the least difficulty. It is not humanly possible that the critics, in dealing with other subjects, should display any higher qualities than those with which their legal work has familiarised us. Accordingly, I have contented myself with carefully testing a few of their allegations. Nobody will deny that the Biblical narrative presents many difficulties to a modern reader. My only object is to see whether these writers possess the necessary qualifications for dealing with them.

There is at least one instance of a matter apparently requiring no special training of any sort, where the statement of "The Hexateuch" could not have been made by any impartial and accurate observer.

In the narrative of the plagues it will be found that one set of stories places the Israelites in Goshen, where the wonders that are wrought in Egypt do not affect them, Exodus viii. 22, ix. 26; while another locates them among the Egyptians and secures them miraculous exemption, x. 21-23; *cp.* vii. 8 *note* [I. 32].

The material part of the note seems to be :—

In x. 21-23 they are living in the midst of the people in Egypt itself, and their immunity from the oppression of the darkness is secured by the appearance of light in their dwellings.

What the Biblical text says is :—

22. . . . There was a thick darkness in all the land of Egypt three days ;

23. They saw not one another, neither rose any from his place for three days : but all the children of Israel had light in their dwellings.

How does that justify the allegation that “they are living in the midst of the people in Egypt itself?” Would any unprejudiced observer, reading these verses with the knowledge of the Goshen narrative which he could gather from other passages, be reasonably likely to infer that these words should be interpreted as “The Hexateuch” interprets them?

I have examined one other remarkable allegation.

Once more, the rebellion of Korah, Dathan, and Abiram, in Numbers xvi, issues in the strange result that their two hundred and fifty followers, 2, are first engulfed in the midst of all their possessions, 32, and then devoured by fire at the entrance of the tent of meeting, 35 [“The Hexateuch,” I. 32].

Accordingly the critics dismember the chapter, and assign the fragments to different sources.

What does the Hebrew text say?

32. And the earth opened her mouth, and swallowed them up, and their households [*or* houses], and all the men that [*sc.* appertained] to Korah and all the substance.

How does that support the representation that the two hundred and fifty, who are described in verse 2 as “princes of the congregation, called to the assembly, men of renown,” were engulfed in the midst of all their possessions?

Three verses later we read of these very men :—

35. And fire came forth from the LORD, and devoured the two hundred and fifty men that offered the incense.

Let us consider for a moment what it is that the critics ask us to believe about this chapter. They say that there were at least two documents—probably more, but certainly P and JE—that one of these contained a narrative that Korah and two hundred and fifty princes revolted against Moses and Aaron, committed a religious offence and were destroyed by fire, while in the other was a story that two other persons, Dathan and Abiram, who were in no way connected with Korah, headed an entirely separate rebellion based on different grounds, and were swallowed up by the earth in a different part of the camp. Then an editor, who desired to compile a consecutive and harmonious narrative of the Mosaic age, and who, be it noted, was never at all squeamish about altering or excising anything he did not like, proceeded to combine these two. He did not insert in his history first the one story and then the other, but he laboriously divided them into fragments and fitted some of these together in such a way as to make nonsense. Let us remember that this was not a point about which anybody could feel doubt, or that could possibly be overlooked. The critical case is that in three out of four consecutive verses two hundred and fifty men are represented as being swallowed up by the earth, and in the fourth as being killed by fire from heaven. If a story, which meant that, and was not susceptible of any other meaning, really was compiled, how can we believe that it would ever have won credence? Was there no one in Jerusalem and Judah who could understand the difference between sense and nonsense? And what conceivable motive could the editor have had? Reverence for the documents?

That would have impelled him to insert both stories untouched.

The critical allegations as to this passage are the more extraordinary, because other considerations should have combined to keep them straight. In Numbers xxvi. we read :—

9. These are that Dathan and Abiram, which were called of the congregation, who strove against Moses and against Aaron in the company of Korah, when they strove against the LORD :

10. And the earth opened her mouth, and swallowed them up together with Korah, when that company died ; what time the fire devoured two hundred and fifty men, and they became a sign.

There can therefore be no doubt that the author who is responsible for this passage, and who, according to the critical story, was a priest writing *before* the combination of the Korah narrative with the Dathan and Abiram account, was familiar with some story, which, as he understood it, represented that Korah, Dathan, and Abiram were swallowed up, but that the two hundred and fifty were burnt. It is true that some critics postulate the existence of a second Korah, who was no Levite, and who was connected with Dathan and Abiram ; but that would leave them with two difficulties : (1) Deuteronomy xi. 6 makes no mention of any such person—who, in fact, is a mere figment of the critical imagination ; and (2) the narrative in Numbers xxvi. distinctly states that the fire devoured two hundred and fifty men, whereas the critics allege that this feature is characteristic of the story which relates to Korah the Levite, and is not told of the company of Korah the figment.

In point of fact, chapter xvi. contains marks of unity which nobody who had had a literary training could help noticing. It is well known that in an angry dialogue it often happens that the parties bitterly echo

each other's phrases. Now that is exactly the case here. Korah says in verse 3: "*Ye take too much upon you,*" and in verse 7 Moses hurls back the phrase: "*Ye take too much upon you, ye sons of Levi.*" Then in verse 9 Moses asks, "*Is it a small thing* that the God of Israel hath separated you," &c.; and in verse 13 Dathan and Abiram take up this phrase, and fling it at Moses: "*Is it a small thing* that thou hast brought us up out of a land flowing with milk and honey?" For literary parallels the reader is referred to Sophocles O.T. 547-552, and the instances collected in Sir Richard Jebb's note on the passage.

The annotator in "The Hexateuch" shows his appreciation of literary touches by gravely remarking on verse 7 that—

This phrase [*i.e.* ye take . . . Levi.—H. M. W.] does not fit the context, for Korah and the princes were not all Levites.

But indeed the notes on this chapter abound in instances of what the writers of this school doubtless regard as critical tact. For example, on verse 13—

Is it a small thing that thou hast brought us up out of a land flowing with milk and honey, to kill us in the wilderness?

We are told that—

As the text stands Egypt is here described as a "land flowing with milk and honey," a designation otherwise reserved for Canaan.

But the critics do not despair of rescuing the memory of their prophetic writer from the charge of committing such an ineptitude, for they discover that the Septuagint reads *into*, and proceed—

If this be preferred, the complaint is that the plea of bringing them into a land of plenty has only involved them in death in the wilderness.

It is true that in that case not only will the whole point of the remark be destroyed, but Dathan and Abiram will be talking utter nonsense, for they will be alleging that Moses has brought them up into a land flowing with milk and honey, to kill them in the wilderness (and not, as the critics seem to think, that he only promised to do so), but such considerations as this have no place in the higher criticism.

14a will then be inappropriate as repetition, and if assigned to E would make a better connection with 14b.

So that not only has the Septuagint text the advantage of making Dathan and Abiram talk nonsense, but it enables the critics to destroy the unity of their speech. And remarks of this description are gravely put forward on almost every page of "The Hexateuch." Truly, with the members of this school, the documentary theory is not a hypothesis ; it is an obsession.

The arguments from religious ideas and ceremonial laws must be left to experts in those subjects. It is instructive to note that the only critical assertions on the subject that I have been at pains to verify—they were chosen, because, if true, there seemed to be real contradictions—show the same inability to reach the level of scientific truth as marked their treatment of the jurial laws. This is how Dr. Driver states the first :—

Deuteronomy xviii. 3 (the shoulder, the cheeks, and the maw to be the priest's perquisite in a peace-offering [*sic*. H. M. W.]) is in direct contradiction with Lev. vii. 32-34 (the breast and the right thigh to be the priest's due in a peace-offering) [Deuteronomy xxxix.].

The actual wording of Deuteronomy is "from them that sacrifice the sacrifice."

Now, Professor W. Robertson Smith ["Religion of the Semites" p. 237 *n.*] holds that the Hebrew word here

rendered by "sacrifice" is a "more general word" than the word in Leviticus which in combination with it is rendered "peace-offering." Whether Professor Smith is right or not I do not of course know; but Dr. Driver's remark is clearly not accurate. Nor must this be thought a mere quibble. If the two passages occurred in an English deed or an international treaty, no lawyer would dream of inferring diversity of authorship. So common are such phenomena in legal documents, that there are well-known rules of interpretation both in municipal and international law, which would immediately be applied. There is no ground for assuming that sacrificial terms of art are used promiscuously in the Pentateuch, and it is therefore evident that there is not the least justification for Dr. Driver's treatment of the question. The exact meaning and relation of the two passages must be left to specialists in sacrificial law; all I am concerned to establish is that the apparent contradiction is merely due to the critical methods, which in this instance, as in so many others, appear to have led one of their leading exponents into a quite unconscious misrepresentation of fact.

In Leviticus xvii. 15, the flesh of an animal dying of itself (*nebzlāh*) is not to be eaten either by the Israelite or by the "stranger": in Deuteronomy xiv. 21 it is prohibited for the Israelite, but permitted to the "stranger" [Driver, Deuteronomy xxxix.].

Leviticus xvii. 15 runs as follows :—

And every soul that eateth that which dieth of itself, or that which is torn of beasts, whether he be home-born or a stranger, he shall wash his clothes, and bathe himself in water, and be unclean until the even: then shall he be clean.

It is with great diffidence that I treat of a regulation that deals with such a purely religious conception as that of clean and unclean, but, so far as I can form an

opinion, this is a camp law applicable only to the time in the desert. There certainly are other camp laws in the same chapter. If this is so, the seeming contradiction is a creation of the documentary theory.

The critical treatment of camp laws appears to be wild in the extreme. I have looked carefully into one. For the sake of brevity, I summarise it in my own language. At the beginning of this chapter [Leviticus xvii.] stands a law providing that every Israelite shall bring any ox or lamb or goat he may desire to kill to the door of the tent of meeting. As to the early history of this law, the critical allegiance is divided between competing improbabilities; I shall therefore only deal with the crowning impossibility, which commands unanimous assent. At some time unknown, some person unknown, by editing old material or inventing new—it matters not which—published, under the guise of a camp law, a regulation which was intended to induce every Israelite to bring any animal that was to be killed to Jerusalem. The documentary theory *compels* the critics to assume that this legislation was to be acted on in Canaan; for nobody would believe that camp laws were forged centuries after the period in the desert had passed into history. But this assumption means that every Israelite, no matter where he lived, from Beersheba to Dan, from the sea to the desert—was to go off to Jerusalem whenever he wanted a chop or steak for his dinner, taking with him the live animal from which it was to be obtained! Some of the critics try to minimise this difficulty by assuming that the rule is post-exilic, and that the Jews only occupied a small area. It is obvious that this theory would break down utterly if only they would enter into details. How many miles' radius would they be prepared to allow to the returning settlers? How many animals would have to be slaughtered at

the Temple each day? How were the carcasses to be conveyed to the homes of their owners?

Clearly this law must be taken to mean what it says. We know that the Israelites had some cattle available [Exodus xii. 38]. The staple food was manna, and the killing of a few animals each week would not in any way diminish the truth of the statement that it was by manna that the children of Israel were fed for forty years. Any other construction of the passage is hopeless.

In truth there is no tool in the critical workshop which is at all fitted for the work that needs to be done. Confronted with a rule that was meant to work, the members of this strange school can think of nothing better than to count the occurrences of the words in which it is enacted. Not to them can we look for that insight into the practical working of human institutions which is the soul of all good historical work.

In a section on "the Testimony of History" "The Hexateuch" says:—

The chief fact to be explained is the repeated and systematic violation of the Deuteronomic and Levitical demands on the part both of the people and their responsible leaders, without any attempt to make royal, priestly, or prophetic practice conform to the plainest requirements of the law. Two circumstances come clearly into view during the early history of Israel's settlement in Canaan, (1) the variety of local sanctuaries, and (2) the frequent performance of sacrifice by laymen [I. 79].

The better to examine this argument, let us assume without inquiry (1) that the critics have correctly understood the law, and (2) that they have rightly appreciated the historical evidence. What follows?

It is clear that before the invention of the synagogue the only period at which an exclusive place of worship was even theoretically *possible*, was the time in the desert.

If the circumstances of the age of the Judges be considered, it will immediately be seen that any attempt to set up an exclusive central sanctuary must have been a failure from its inception. The distances, the nature of the country and the want of roads, would alone have been prohibitive. The tribes were not always on good terms with one another. They dwelt at intervals, the interstices being filled by an alien and sometimes hostile population. Parts of the country were frequently subject to foreign domination. Moreover, it is obvious that, if the law of the central sanctuary had been in force in the manner contemplated by the critics—

(1.) Three times a year the whole country, except the capital, must have been entirely depopulated, or else

(2.) The great mass of the women and children would never have performed or witnessed any act of worship at all.

(3.) Nobody, except the inhabitants of the capital, could have performed any act of worship except at these three times.

Many of these arguments also apply with full force to the time of the kings. Josiah's experiment only lasted a few years, and we have little information as to its working. The inference is irresistible; either the Deuteronomic law is nonsense, or the critics have misunderstood the legislator.

With regard to the performance of sacrifice by laymen, this too was inevitable, seeing that the priests were concentrated in but a few places. Moreover, it must be remembered that at a time when no central sanctuary was possible, the dues would be comparatively insignificant, and the priests might often find it best to dwell in their cities. Admitting, therefore, that the law (as the critics understand it) was broken, we reach the conclusion that its observance would have meant the destruction of both religion and people.

But even leaving all such considerations entirely out of the question, the practice was clearly an old practice, which continued throughout the Mosaic age. In Leviticus we find a law which is expressed to be made—

To the end that the children of Israel may bring their sacrifices, *which they sacrifice in the open field*, even that they may bring them . . . unto the door of the tent of meeting, *unto the priest* [xvii. 5].

And the testimony of Deuteronomy is not less emphatic :—

Ye shall not do after all the things that we do here this day, every man whatsoever is right in his own eyes. . . . But when ye go over Jordan, and dwell in the land . . . then it shall come to pass that the place which the LORD your God shall choose to cause his name to dwell there, thither shall ye bring all that I command you [Deuteronomy xii. 8-11].

The principle which is emphasised in the following quotation from a brilliant writer on legal history would therefore apply :—

The truth must not be pressed too far, but a truth it is, that, even now, Law is rather a thing to be discovered than a thing to be made. To think of a legislator, or even a body of legislators, as sitting down, in the plenitude of absolutism, to impose a law upon millions of human beings, is to conceive an absurdity. How shall such a law be enforced? By a single ruler? By a group of elderly legislators? By a few hundred officials? By an army? We know the power of discipline; and we may grant that a comparatively small but well-disciplined army can control an immense mass of unorganized humanity. But the army must have laws too, and how are these to be enforced? Perhaps by another army. [Jenks: "Law and Politics in the Middle Ages," pp. 64-65.]

As Mr. Jenks says, the truth must not be pressed too far; but it must be clear that unless the children of Israel had been given new hearts, no law and no covenant could have prevented their acting as they did.

Would a historian regard this as strange? Do the annals of other religions tell of no survivals of earlier forms of worship?

It must always be remembered when we consider the Mosaic law that we never have the whole of it before us. The written law presupposes an unwritten law. This can be shown very easily from the jural laws, either by pointing to the almost complete absence of departments of law which must have existed, or by producing laws which imply others which cannot be found. To take only one instance, the existence of slavery is always assumed, never enacted. Moreover, we have no knowledge of the motives which induced the legislator to commit certain fragments of the law to writing. But if this be so, if we merely have a selection of Mosaic law and are ignorant of the principles on which it is made, we must admit the probability of our misunderstanding even that which seems perfectly clear. The unwritten law must often have interpreted and qualified the language of that which was written. Hence the critical line of argument appears here too to rest on foundations of sand.

There is an argument from language and style, consisting of lists of words and phrases alleged to be characteristic of the several sources. It would be ludicrous to expect that a school of writers, who have shown themselves so incapable of grasping the broad meaning of the passages with which they deal, should display any appreciation of those niceties of meaning and sound that go to make style. The real answer to all such arguments is the maxim of the law of evidence: *testimonia ponderanda non numeranda sunt*.

It need scarcely be said that these writers never succeed in putting forward any plausible explanation of the phenomena which their mastery of arithmetical pro-

cesses has enabled them to detect. Why, for example, should the style of certain portions of JE, and certain portions only, show indications of Deuteronomic revision? Or why should there be points of contact between the style of H, and particularly of Leviticus xxvi., and that of D? Why indeed? The critics have no notion why.

If that be so, thy state of health is poor,
But thine arithmetic is quite correct.

It has been suggested that the record of Abraham's purchase of the cave of Machpelah, Genesis 23, reads like "a translation into Hebrew from a Babylonian cuneiform document, the phrases and style being those of Babylonian texts and the Tel-el-Amarna tablets." The particular expressions on which this view is based have not been adduced ["The Hexateuch," I. 64, which gives a reference to Sayce, *Expository Times*, January 1898, p. 177, as the source of the quotation].

On turning up the reference we read at page 178 :—

The words for "silver" and "weighing" in the sense of "paying" are the same in Hebrew and Babylonian, as is also the word for "shekel," which is derived from *shāyal*, "to weigh," and was borrowed from Babylonian by the languages of the West. The gift of the land had to be made "in the presence" of witnesses both at Hebron and in Babylonia, the description of the land and its boundaries, which takes us back to Babylonian law and land-surveying, was similar in both cases, and the Hebrew word *yāqām*, from *qūm*, "to rise up," which is rendered "made sure" in the A.V., corresponds with the Babylonian *illā*, from *elū*, "to go up," which has the technical signification of being "settled" or "made sure."

Professor Sayce then proceeds to deal with other phrases.

With deference to the learned Professor, I am unable to acquiesce in this argument. Some of these phenomena re-appear in the conveyance to Jeremiah, others may be paralleled from many systems of law. But there is one conspicuous difference which the learned Pro-

fessor does not notice,—the absence of writing from the conveyance mentioned in Genesis.

It may be useful here to make a remark which has been suggested to me by the argument from language and style. We frequently find laws introduced by the formula, "speak unto the children of Israel and say unto them;" and it appears to be assumed that such laws were necessarily intended primarily for publication to the whole people. It seems to me quite possible that this assumption is misleading. We can only guess at the meaning that contemporaries would attach to such phrases. This may be made clear by pointing to the fact that in Exodus xix. 7, "Moses called for the elders of the people and set before them" certain matters, while in the very next verse, which the critics attribute to the same source, we read that "all the people answered together." If "the elders" and "all the people" can be equated in this way, it may be as dangerous to understand the set phrases with which laws are introduced too literally, as it would be for a foreigner, with no knowledge of English history or law, to base theories on the "Be it enacted by the King's most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same," of a modern English statute.

Before closing this paper it may be well to say a few words about a point on which the critics seem incapable of clear thought.

In some cases, no doubt, an aim formerly indistinctly expressed is more sharply formulated, as in others, modifications or adaptations are introduced which the tendencies of the age required. . . . Deuteronomy may be described as the *prophetic re-formulation, and adaptation to new needs, of an older legislation*. It is highly probable that there existed the tradition

of a final legislative address delivered by Moses in the plains of Moab : there would be a more obvious motive for the plan followed by the author, if it could be supposed that he worked thus upon a traditional basis. But be that as it may, the bulk of the laws contained in Deuteronomy is undoubtedly far more ancient than the time of the author himself : and in dealing with them as he has done, in combining them into a manual for the guidance of the people, and providing them with hortatory introductions and comments, conceived in the spirit of Moses himself, he cannot, in the light of the parallels that have been referred to, be held to be guilty of dishonesty or literary fraud. There is nothing in Deuteronomy implying an interested and dishonest motive on the part of the (post-Mosaic) author ; and this being so, its moral and spiritual greatness remains unimpaired ; its inspired authority is in no respect less than that of any other part of the Old Testament Scriptures which happens to be anonymous [Driver, "Literature," 90-91 ; Deuteronomy lxi. lxii.].

I would most strenuously protest against this view. The man who scrawls in the margin some note, explanatory, historical, or archæological, some illustrative quotation—perhaps a snatch of song—some story of a patriarch, which he believes to be true, is morally guiltless ; but he who knowingly writes that God has said that which He has not said, that He has made an agreement on certain terms, when in fact He has not made an agreement on those terms, commits an offence, which, having regard to the circumstances, is probably the most heinous of which a human being can be guilty. Call it "prophetic re-formulation and adaptation to new needs," or "modification," or by any other term designed to obscure the truth, the nature of the act remains the same. Nor can it be contended that a different conception of the nature of the offence would have found favour in ancient Israel. "Ye shall not add"—it is from Deuteronomy itself that I am quoting—"Ye shall not add unto the word which I command you, neither shall ye diminish

from it" [iv. 2]. The view of the statesman and legislator may be gathered from the provisions against false prophets; the views of the moralists from the prophecies of Jeremiah and Ezekiel. As to the suggestion that God inspired the forgeries—a suggestion which should be attributed to mental confusion, and not to an intent to blaspheme—the answer of the Pentateuch is clear, convincing, annihilating: "God is not a man, that he should lie" [Numbers xxiii. 19].

The fact is that there is only one branch of the investigation into the age and composition of the Pentateuch, on which the critics are by their training qualified to write—viz., that which deals with the evidence from linguistic history. As they are experts in philology, they naturally refrain from putting any philological argument in the forefront of their case. The details of such statements as they do make on this subject must be left to specialists, but the general cogency of the evidence may safely be gauged by a single fact: P, which is now alleged to be the latest of the documents, was originally said to be the earliest. As to the rest of the supposed evidence, it consists of allegations on subjects concerning which their training does not entitle these writers to express any opinion. Their treatment of legal and historical materials is beneath contempt; so are their exegesis and literary criticism. Indeed, they appear to have reduced every department of Biblical study to chaos.

Nor is there any cause for surprise in this: it is the logical and necessary outcome of their professed methods. Some years ago an eminent critic wrote the following sentence:—

The order of research ought surely to be, first the study of exegesis, then the comprehensive investigation of critical problems, and lastly the history both of the literature and of the outer and inner development of the people of Israel.

So mischievous are these principles that I would fain believe that that eminent critic hardly meant the words to have their full force. The context of the passage shows that he had some particular schemes of external history and critical investigation in view, and perhaps he would limit the dictum to these in spite of the broad language used. But, be that as it may, it correctly represents the actual practice of the higher critics. Yet there is not in fact any possibility of drawing a hard and fast line between exegesis, criticism, and history. The coincidences of truth are infinite, and a grasp of the meaning of any particular passage frequently—perhaps habitually—carries with it a certainty as to the date of the passage, and *pro tanto* as to the development of the people. There can be no sound Biblical exegesis, unless it go hand in hand with the study of the outer and inner development of Israel. The historian and the archaeologist, the jurist and the economist, have each as good a claim to be heard on the exegesis of the documents with which they deal, as the theologian and the philologist. Having through the neglect of this principle misunderstood the texts, the critics then proceed to build critical theories on the false data obtained by this pernicious system of exegesis, and then the history is fitted into the Procrustean bed of the theories resulting therefrom. But history—political, economic, legal, constitutional, social—has also a bearing on critical problems. It, too, can bear witness to the date and authenticity of the documents in which its records are preserved.

It must be evident that Biblical studies are in a deplorable condition. One large body of students regards the Pentateuch simply as a collection of sermon-texts; another, as a field for the practical application of the problem “to trisect a given verse.” Nobody seems to have even a dim conception that it is the record of the achievements of the greatest statesman, organiser, legis-

lator, and leader of men, whom God ever inspired. Still less is there any appreciation of the practical problems with which he had to deal, and the solutions he was enabled to propound. If this state of affairs is to be ended, many changes will have to be made in the methods of study. At present, word-peddling is supposed to be an adequate substitute for a grasp of the author's meaning, and date-mongering for an apprehension of the difficulties of a passage. The critic, who tries to deal with a difficulty, habitually reasons in some such style as this: "I do not understand the passage. Therefore it is nonsense. Therefore it has been made nonsense by the deliberate union and garbling of several documents, each of which made sense by itself!" An exhaustive and impartial scrutiny of evidence is—unless unintelligent word-counting be reckoned such—absolutely unknown.

I have spoken frankly, because a full and candid recognition of the truth must be the first step to better things. New and better methods are absolutely essential. Students must learn to see accurately, to report correctly, and to think clearly; the evidence of the law and the history must be carefully examined by specialists; sound canons of evidence must be adopted, and real learning must no longer be postponed to baseless speculation.

CHAPTER II

PILLAR-COVENANT AND TOKEN-COVENANT

§ I. INTRODUCTORY

THE most characteristic features of the outward form of the legislation of the Pentateuch appear to be due to what we may call covenant¹ ideas, that is, ideas which either caused the invention of covenants, or ideas which arose from them. Perhaps professed students of ancient law may be able to inform my present ignorance, but certainly I am not acquainted with any other system of law, which came into existence, not as the result of legislation or custom or judicial decision, but in consequence of treaty or agreement. There are some decided cases in the Pentateuch, there was a good deal of customary law in the Mosaic age, and legislation in ordinary form also plays some part; but the great bulk of the jural law and of much else is presented in the shape of terms of covenants made between God and the children of Israel. To a great extent this should be manifest even to the most casual reader; but points, which are not so obvious, are equally certain. The bulk of the book of Deuteronomy in form resembles a modern English deed, and occasionally even suggests the language of English conveyancers. Such an expression as "testimonies" can only be employed in speaking of laws, because they are concerned as "witnessing" the

¹ I use the word "covenant" as a technical term of Hebrew religion and law, entirely freed from its English legal associations. English readers are so familiar with the covenants of the Bible, that it has seemed to me wiser to follow this course than to adopt some other expression.

agreement of which they are terms. When I come to consider the structure of the Book of Deuteronomy, I shall lay before my readers the outline of an ordinary English deed for purposes of comparison, but, for the moment, it is sufficient to point out that we are told in so many words that the book contains a covenant,¹ which is supplemental to the Sinaitic covenant—

These are the words of the covenant which the LORD commanded Moses to make with the children of Israel in the land of Moab, beside the covenant which he made with them in Horeb [Deuteronomy xxix. 1 ; (xxviii. 69)].

Not less striking is the language of a verse of Leviticus, where the English Versions read :—

These are the statutes and judgments and laws, which the LORD made between him and the children of Israel in Mount Sinai by the hand of Moses [Leviticus xxvi. 46].

We may wonder how many of the millions of people who have read this verse in various languages have stopped to ask what it means. As it stands in English, the sentence is unintelligible on any ordinary theory of legislation. We could not speak of a statute or a judgment or a law as being made *between* the Crown in Parliament and British subjects; and, when for an ordinary human legislature we substitute God, the difficulty is increased. Who shall judge between the Lord and the children of Israel?

Although it is my object to write purely as a lawyer, and in particular to keep as far from religious topics as is compatible with treating of a system of this nature, I have now reached a point where religion is most directly affected. When I come to the case of Shelomith's son, I shall be dealing with a judgment, which,

¹ The Hebrew word rendered "covenant" appears to be used not only of the whole transaction, but also (*inter alia*) of the contents of the document, where there was a document.

for all I know, may have some religious importance, but which belongs primarily to the lawyer, for, from the purely legal point of view, it is of vital consequence : and similar remarks apply to most of the points I have considered or shall consider. But with the covenants it is otherwise. An understanding of them is essential to the lawyer, but among their provisions are to be found terms that are more important than any judgment laws. In order, therefore, to minimise the risk of misapprehensions arising, it is proper to state at once the leading ideas of this chapter.

It must not be thought that in emphasising the importance of the covenant I desire to cast the faintest doubt on any other basis of religion, or that I am ignorant of the fact that other bases exist. I am not at all concerned with any religious question, except in so far as my inquiry into legal institutions compels me to take cognisance of notions that primarily concern religion. If I am throughout one-sided, it is not because I do not know that there are other sides to the matters I have to discuss, but because I believe that I can best advance Biblical studies by drawing attention to a side that has been neglected.

The central idea that I propose to develop is put very clearly in the Pentateuch more than once, *if I am right in taking certain passages literally*. For the present, I select the following extract from a speech of Moses in Deuteronomy xxix. :—

10. Ye stand this day all of you before the LORD your God ; your heads, your tribes, your elders, and your officers, even all the men of Israel,

11. Your little ones, your wives, and thy stranger that is in the midst of thy camps, from the hewer of thy wood unto the drawer of thy water :

12. *That thou shouldest enter into the covenant of the LORD thy God, and into his oath, which the LORD thy God maketh [cutteth] with thee this day :*

13. *That he may establish thee this day unto himself for a people, and that he may be unto thee for a God, as he spake unto thee, and as he sware unto thy fathers, to Abraham, to Isaac, and to Jacob.*

14. Neither with you only do I make [cut] this covenant and this oath ;

15. But with him that standeth here with us this day before the LORD our God, and also with him that is not here with us this day.

As I understand this passage, it refers to a covenant to be made between two parties, the Lord and Israel. The Lord, as it seems to me, is conceived as becoming the God of Israel, not merely because He created man, or because He commanded the children of Israel to worship Him, or because He brought them forth out of the land of Egypt. All these things have their importance, but there are other bonds between God and people. In a series of sworn treaties called covenants, Israel literally avouches the Lord to be His God, and the Lord literally avouches Israel to be a people holy unto Him. The other ideas more or less follow from this central conception. Many of the expressions used in covenant passages appear to have a "conveyancing" meaning—that is, a special technical sense when used in connection with covenants. Moreover, I shall suggest that, subject to certain necessary modifications, the form of these sworn treaties often follows the form that would be adopted in sworn treaties between two men. For instance, when Jacob and Laban enter into a covenant in Genesis xxxi., we find an oath, a heap of stones, a stone set up for a pillar, a sacrifice, and an eating of bread. At Sinai we find "words" and judgments, an altar,—which appears to have replaced the heap of stones—"twelve pillars, according to the twelve tribes of Israel," burnt-offerings and peace-offerings, and elders eating and drinking. In Deuteronomy we find "words of a covenant," which seem to be the same

as "a covenant and an oath," and commandments to set up great stones, to build an altar, to offer burnt-offerings and sacrifice peace-offerings, and to eat. Again the style of several passages would seem to be influenced by what may be called covenant considerations. Indeed, speaking generally of all the passages that I have had to consider, it appears to me that the style of the Pentateuch is habitually influenced by practical considerations—that is, the choice of words, expressions, and rhythm is determined by the objects in view and the subject-matter treated.

§ 2. OF OATHS

In a mature system of law great emphasis is laid on the notion of *contract*—that is, of agreement enforceable by law, but in primitive societies this notion is not developed. Some form of sale or exchange must indeed exist, but the transactions of this nature are commonly such as are immediately completed. Even in cases of deposit or pledge, the law punishes "matters of trespass"; it does not enforce contractual rights. In Exodus, as in the Roman law of the twelve tables, twofold restitution must be made in cases of deposit; but in both, the remedy is delictual, not contractual. Again, in such transactions fraud is regarded as a religious, not a civil offence. In Leviticus we actually find dealing falsely in "matter of deposit or bargain" dealt with as a "trespass against the LORD," and not as falling within the purview of the civil law [vi. 2 (v. 21)]. Many of the transactions, which we accomplish by means of contract, are unknown to early societies: all others are very much rarer than with us. Still, there remain some which must be carried through by some means. How is this effected? By the use of oaths. Jacob is desirous of buying Esau's

birthright—that is, something that is not capable of being simply handed over or assured to him on the purchase taking place: Esau is willing to sell, provided that he receives the price forthwith. Esau binds himself to Jacob by an oath. In the Pentateuch we find nothing about the capacity of women to contract, but we find a whole chapter of “statutes which the LORD commanded Moses, between a man and his wife, between a father and his daughter, being in her youth, in her father’s house” [Numbers xxx.], and this chapter deals solely with vows and oaths. It is very instructive to compare the language of the Pentateuch on the subject of oaths with the expressions used by writers on more advanced systems of law in connection with contractual obligations—

When a man voweth a vow unto the LORD, or sweareth an oath to bind his soul with a bond, he shall not break his word; he shall do according to all that proceedeth out of his mouth [Numbers xxx. 2].

Compare with that the celebrated definition of *obligatio* given by the Roman jurists—

Obligatio est juris vinculum, quo necessitate adstringimur alicujus solvendae rei, secundum nostrae civitatis jura [Justinian, Inst. iii. tit. 13].

And in a well-known text-book on the English law of contract we read—

Obligation is a *legal bond* whereby constraint is laid upon a person or group of persons to act or forbear on behalf of another person or group [“Anson on Contract,” Pt. I. § 2].

In all three cases there is a bond which binds, but, whereas in Roman and English law the bond is created by an agreement and enforced by the Courts, in Hebrew law it arises from the oath, and is enforced by God.

I cannot do better than insert here a passage written

by Sir H. Maine as the result of a study of a number of ancient codes, of which the Pentateuch was *not* one. It will at once show how the topics of the jural laws bear witness to their age:—

Nine-tenths of the civil part of the law practised by civilised societies are made up of the Law of Persons, of the Law of Property and of Inheritance, and of the Law of Contract. But it is plain that all these provinces of jurisprudence must shrink within narrower boundaries, the nearer we make our approaches to the infancy of social brotherhood. The Law of Persons, which is nothing else than the Law of Status, will be restricted to the scantiest limits as long as all forms of status are merged in common subjection to Paternal Power, as long as the Wife has no rights against her Husband, the Son none against his Father, and the infant Ward none against the Agnates who are his Guardians. Similarly, the rules relating to Property and Succession can never be plentiful, so long as land and goods devolve within the family, and, if distributed at all, are distributed inside its circle. But the greatest gap in ancient civil law will always be caused by the absence of Contract, which some archaic codes do not mention at all, while others significantly attest the immaturity of the moral notions on which Contract depends by supplying its place with an elaborate jurisprudence of Oaths. There are no corresponding reasons for the poverty of penal law, and accordingly, even if it be hazardous to pronounce that the childhood of nations is always a period of ungoverned violence, we shall still be able to understand why the modern relation of criminal law to civil should be inverted in ancient codes [Maine: "Ancient Law," 368-369].

Apparently an oath was an essential part of every covenant made between men. Sometimes the oath perhaps took the form of question and answer,¹ a form that naturally recalls the Roman *stipulatio*; in other cases we find a declaration of intention, but in every case the object in view was probably attained by some sort

¹ See Genesis xxi. 29, 30, "What mean these seven ewe lambs? . . . These seven ewe lambs shalt thou take." Cf. xv. 8, "Whereby shall I know?" 13, "Know of a surety."

of an appeal to some supernatural power. There is no reason to suppose that this power was always God—for instance, when Benhadad and Baasha made a covenant [1 Kings xv. 19], it is extremely unlikely that they invoked only the God of Israel, if indeed they invoked Him at all. Be that as it may, we see that a covenant was a treaty in very solemn form giving rise to a bond [Ezekiel xx. 37], that bound the soul of the person swearing in virtue of an appeal to an external and superior power.

§ 3. SOME LEGAL TERMS

The Bible shows us many forms of covenants. We need only consider two classes. In the first of these we always find a "token," and I shall therefore call the covenants of this class "token-covenants." These are always said to be "established." On the other hand the covenants of the second class have no token, but have a "witness," so that it is natural to call them "witness-covenants." They are always said to be "cut." Witness-covenants may be sub-divided into at least two groups, one of which would contain the Abraham-Abimelech treaty, in which the taking of seven lambs is witness, while in the other we must place the utterly different transactions in which we find stones or pillars. These are the only witness-covenants we need study, and I shall henceforth call them pillar-covenants. The first token-covenant appears to be a good deal more primitive than the first pillar-covenant, but as we have no indubitable instance of a token-covenant made between men, we must begin by studying the pillar-covenants. But, before entering on this task, we must try and ascertain the meaning of some technical terms.

Owing to the implication of covenant terms with various expressions denoting law or command, it is

necessary to enlarge the scope of our inquiry and consider some words which have no special conveyancing significance. In doing this, I do not propose to attempt a complete and accurate definition of law. I shall merely draw attention to such aspects of the subject as concern the matter in hand.

We may begin by thinking of a jural law as a rule of human intercourse which the courts will enforce. When I read—

He that smiteth a man, so that he die, shall surely be put to death,—

I understand that I am forbidden to murder my neighbour, and that, if I do so, I shall be tried and sentenced to death by a tribunal of some sort. In Hebrew this may be called a judgment or doom, מִשְׁפָּט, a word, which, like the Latin *jus*, has a great many technical meanings, but which, so far as I know, is *not* a covenant term. Of course, judgments may be embodied in covenants, and they may then either be referred to as judgments, or by some expression which shows that the speaker is thinking of them as terms of the covenant, but the *word* judgments does not appear to me to have any conveyancing signification.

Every jural law is a command,¹ but not every command is a jural law. Jural laws can only deal with external conduct. Take such a precept as "Honour thy father." It is a precept concerning a purely mental affection; and no human court, whether secular or spiritual, can take cognisance of a mental affection, unless and until it is evidenced by some overt act. We find judgments directed against smiting and cursing a parent: but the precept, as it stands, is as incapable of

¹ For an analysis of command, see Austin's "Jurisprudence," Lecture I. I am of course only concerned to bring out notions that concern my immediate purpose, not to define a command, and I therefore ignore whole classes of commands.

being enforced by any human tribunal as is the promised reward "that thy days may be long in the land." Or again take "Thou shalt love thy neighbour as thyself": there is no human tribunal whose decrees run in men's hearts.

We see, then, that the term "command" embraces not merely jural laws, but also Divine laws—that is, rules of conduct which can and will be enforced by God, and moral precepts. Hebrew has a word, מצוה—I shall use the transliteration *mitsvah* in dealing with the passages where it occurs—which is usually translated commandment. Philologically it certainly does mean that. I shall show hereafter that it also has at least two conveyancing uses. Probably, when it is not used in a technical sense, it is wide enough to denote *any* precept—not merely one that is enforced by the fear of an *evil* conditioned on its non-observance.

The Pentateuch has several different ways of endeavouring to secure the observance of any given precept. Perhaps I can best make this clear by giving a list based on substance and not on form:—

1. Do this (no reason being apparently assigned).
2. Do this, and God will reward you; or
Do this, or God will punish you.
3. Do this, or the courts will punish you.
4. Do this, as the term of an agreement.
5. Cursed be he that does this.

It will, of course, be understood that I am careful to leave out of consideration anything that has to do with the idea of sin, or with the sacrificial law.

We know that the third item of this list is properly called a judgment, and the fifth a curse. The first and second are commandments, and do not appear to have any special name. I shall shortly consider the appropriate names of the fourth, but first I desire to point out that the Pentateuch never hesitates to put sub-

stantially the same idea in all these different ways. For example, the fifth commandment comes under the second and fourth items of this list; then rules which cover part of it are found in the judgments of the Sinaitic and Deuteronomic covenants and of Leviticus; in Leviticus xix. 3, we find a commandment to "fear every man his mother and his father"; and in the curses of Deuteronomy we read—

Cursed be he that setteth light by his father or his mother.

I come now to the word *mitsvah* with its plural *mitsvoth*. In Nehemiah x. 32 (33), where the English versions read—

Also we made ordinances for us—

the Hebrew text has וְהַעֲמַדְנוּ עָלֵינוּ מִצְוֹת, which means "and *we made to stand upon us mitsvoth*." A very vivid picture this of what a command is not. No man can make a command to stand upon himself. A command requires two persons, a commander and a person commanded. The obligation which is made to stand on you by somebody else arises from command: that which is made to stand on you by yourself, from agreement. In point of fact Nehemiah is speaking of an agreement under seal, into which he and other persons entered. It is clear, then, that *mitsvoth* here has some special meaning, such as "contractual obligations." It is therefore as possible to speak of God keeping His *mitsvoth* as of His keeping His promises.

But the singular also has a special meaning. In the account given by Jeremiah of his purchase of land, we find—

So I took the deed of the purchase, both that which was sealed, *the mitsvah and the statutes*, and that which was open [xxxii. 11].

It is said that the words "the mitsvah and the statutes" do not occur in the Septuagint, and it has been suggested that they are not original. I can offer no opinion on this point of textual criticism, but one thing is clear. Even assuming the words to have been a gloss, they must have conveyed some meaning to the glossator. Nobody would have inserted such words unless in fact he was familiar with deeds that did contain a "mitsvah" and "statutes." Moreover, we know of two documents that clearly contained a mitsvah. In Exodus xxiv. 12, we find a very similar phrase—

And I will give thee the tables of stone, even the teaching [*or law*] and the mitsvah, which I have written to teach them.

And in Deuteronomy the word is frequently used. Thus we find the following passages :—

Now this is the mitsvah, the statutes, and the judgements, which the LORD your God commanded to teach you [vi. 1].

Keep all the mitsvah which I command you this day [xxvii. 1].

It should be added that in old Egyptian contracts we find well-defined sections beginning with formal words. [*Law Quarterly Review*, 1898, 49, 50.]

It does not seem to me practicable to attempt to determine what part of a legal document constituted the mitsvah. It would, of course, be easy to say that, as in Deuteronomy vi. 1, we read—

Now this is the mitsvah, the statutes, and the judgements, and in Deuteronomy xii. 1—

These are the statutes and the judgements,—

it is probable that vi.-xi. corresponds to what would be called the mitsvah of an ordinary legal document; but this is mere guess-work. Besides, mitsvah appears some-

times to be used of the whole document or its contents. In any case it does not seem safe to attempt to determine the exact meaning of any of these technical terms. Unless archæology should succeed in throwing light on the subject, we must content ourselves with the fact that they have one or more conveyancing meanings.

Similar remarks apply to כְּתוּב, the word here translated statute. A slightly different formation, חֻקִּים, is found in Leviticus xxvi. 46, and perhaps has a technical use.

The Hebrew expression for "words" is used with a technical meaning in some covenant passages. This may be seen from a comparison of the following extracts :—

Behold the blood of the covenant, which the LORD hath cut with you on all these words [Exodus xxiv. 8].

Write thou these words : for after the tenor of these words I have cut a covenant with thee and with Israel [Exodus xxxiv. 27].

And he wrote on the tables the words of the covenant, the ten words [Exodus xxxiv. 28].

One other word must be briefly noticed. It is possible to regard law as something that is taught, and accordingly we find the word *torah*, תּוֹרָה, frequently used of law. It is the appropriate term for a whole body of law, and is used of the whole Pentateuch. I shall always either keep the original word or else translate it by "teaching." On the whole, it does not appear to have any special covenant signification, but the evidence is so doubtful that it is impossible to be certain of this. It is proper in this connection to draw attention to Isaiah viii. 16 :—

Bind up the testimony, seal the torah among my disciples.

§ 4. THE PILLAR-COVENANT

The account of the first pillar-covenant runs as follows :—

44. And now come, let us cut a covenant, I and thou ; and let it be for a witness between me and thee.

45. And Jacob took a stone, and set it up for a pillar.

46. And Jacob said unto his brethren, Gather stones ; and they took stones, and made an heap : and they did eat there by the heap.

47. And Laban called it Jegar-sahadutha : but Jacob called it Galeed.

48. And Laban said, This heap is witness between me and thee this day. Therefore was the name of it called Galeed :

49. And Mizpah, for he said, The LORD watch between me and thee, when we are absent one from another.

50. If thou shalt afflict my daughters, and if thou shalt take wives beside my daughters, no man is with us ; see, God is witness betwixt me and thee.

51. And Laban said to Jacob, Behold this heap, and behold the pillar, which I have set betwixt me and thee.

52. This heap be witness, and the pillar be witness, that I will not pass over this heap to thee, and that thou shalt not pass over this heap and this pillar unto me, for harm.

53. The God of Abraham, and the God of Nahor, the God of their father, judge betwixt us. And Jacob sware by the Fear of his father Isaac.

54. And Jacob offered a sacrifice in the mountain, and called his brethren to eat bread : and they did eat bread, and tarried all night in the mountain [Genesis xxxi. 44-54].

It is of course impossible to say whether this is an account of two separate covenants, or of one covenant which had two operative parts—the declaration about the daughters, and that which fixed the boundary to be observed by the two parties. It is more important to take careful note of the indubitable characteristics of this form of covenant. From the first it is avowedly *bilateral*. Both parties swear. Moreover we find a pillar and a

heap of stones, which are "witnesses," an oath, a sacrifice, and a feast.

With the origin of these ceremonies we are not concerned. It is thought by some that they were entirely religious, and probably that was very largely the case. It is important, however, to remember that we see these ceremonies used to make covenants between God and Israel, and that in those days, therefore, they cannot have been associated with any heathen form of worship. Whatever the early history of the pillar-covenant, whatever the significance of a pillar, when erected as an act of worship, and not as "witness" of a covenant, no sane man will suppose that the Decalogue was made binding by means of rites which were felt to be acts of worship paid to a heathen idol. If the pillars had a religious origin, such associations had been forgotten in the days of Moses, and they remained merely as the symbols of a covenant. Nevertheless we must pause for a moment to note the theory of evidence which is involved in this transaction.

Pillar and heap are conceived as witnessing the covenant. In Joshua xxiv. 27 we read—

Behold, this stone shall be a witness against us ; *for it hath heard* all the words of the LORD which he spake unto us : it shall be therefore a witness against you, lest ye deny your God.

The idea of written evidence is unknown to Jacob and Laban. When we meet it in the Mosaic age it is as an addition to the old "witnesses" of a covenant. As to Joshua, he knew writing, and in the previous verse to that which contains this curious notion of the functions of a stone, we are told of his writing in the book of the law. Moses was of course above the level of his age. Probably the ordinary Israelite of the Mosaic period regarded writing in pretty much the

same way as the Franks and Lombards of the following passage:—

A scientific law of evidence comes very late in legal history. Primitive tribunals know only formal and preappointed methods of proof and disproof. . . . The simplest and best proof of all, as it seems to us, the proof by writing, is, of course, unknown in primitive times; and, even when writing becomes known, it is long before it is used as a vehicle for expressing contracts. So true is this, that the Lombards, who, when they settled in Italy, found the Roman inhabitants using written contracts (the *syngraphæ* and *chirographa* of late Roman law,) seem to have been utterly puzzled by them. We must not suppose that even the *syngrapha* and the *chirographum* were written contracts in our sense of the words; but they fulfilled the very important function of recording or proving the existence of contracts. The Lombards seem to have treated them, not as proofs, but as *pledges*. The pledge having, as we have seen, become a mere symbol, the written document would serve as well as anything else. A very learned German jurist, Dr. Brunner, has established the interesting fact that, among the Franks, in the parallel case of conveyances of land, the blank parchment upon which the record of the transaction was ultimately to be written, was handed over, with the turf, twig, glove, or other symbol, to the intending purchaser, who *subsequently* caused it to be inscribed with a record of the proceedings. Sometimes even the inkpot played a similar part. Dr. Brunner has also noticed facts which suggest that a similar idea governed the case of Contracts [Jenks: "Law and Politics in the Middle Ages," pp. 276-277].

It is curious to notice that the Sinaitic covenant had a written "testimony," but *in addition to* pillars, and in Deuteronomy the writing is to be *on the stones*. We have seen that the pillars had become mere symbols.

The essence of an oath is the combination of a promise or statement with an appeal to some superior Power to help, to judge, or to punish. In English this appeal is called a *jurat*. In the covenant between Jacob and Laban there is a very clear *jurat* in verse 53, where God is invoked to judge between the parties to the

agreement. It comes at the end of the operative words.

Now, when God makes a covenant, a very obvious difficulty at once arises. We find pillars, a heap of stones or an altar, a declaration containing the terms of the agreement, feasting and sacrifice; but the jurat is missing. There is no superior power, external to the agreement, by whom either God or Israel can swear. If I swear to a man, I swear by the Lord, but if I swear to God, there is no outside being by whom I can swear. Moreover, it is really an extension of language to speak of God as swearing. So far as the human mind can understand, there is no distinction between God's promise and His oath. Sometimes we find that God swears by Himself, but sometimes—as for instance in the token-covenant with Noah—we find nothing that in any way suggests, or corresponds to a jurat. But when the covenants are not simply promises by God, but bilateral agreements, imposing obligations on Israel, we find at the end of each declaration (that is in the place, where, if the agreement were between men, we should expect a jurat) something which corresponds to a jurat, and which I shall term a quasi-jurat. It always consists of inducements to observe the covenant, mingled promises and threats. As there is no third party who can enforce the covenant, He, who alone has the power to judge, to punish and to reward, announces how He will requite compliance or non-compliance with the terms of the agreement. In the covenant at Sinai we find a quasi-jurat in Ex. xxiii. 20–33. In Deuteronomy it consists of the great blessing and curse, xxviii. The style adopted is always sufficiently characteristic for the critics to allege either that the passage belongs to D, or that it has received additions or modifications from the Deuteronomic school, or else that it has points of contact with D. We shall find a

quasi-jurat in one instance of a token-covenant. Moreover, this style appears to be frequently adopted when God renews or confirms a covenant, for in Genesis xxvi. 2-5, and Exodus xxxiv. 10-26, Deuteronomic revisers are postulated by the annotator of the Hexateuch. The plain truth is that when God utters a promise or a threat, appropriate language and rhythm are employed.

§ 5. THE COVENANT AT SINAI

We now come to the great covenant in Exodus xix. *seqq.* Considering how little we know of the Hebrew covenant and the ideas of the Mosaic age, the account is singularly lucid and intelligible. The covenant is a pillar-covenant of the Jacob-Laban type, and the variations from the form with which we are familiar are, with one important exception, very slight. The heap of stones has become an altar, and we find a sprinkling of people and altar with blood. The only really important change is the introduction of writing as a sort of adjunct to the old covenant formalities. There is of course the usual covenant declaration and quasi-jurat, twelve pillars—"according to the twelve tribes of Israel"—sacrifices and a meal.

The account opens with a careful date. Then God called Moses up to the mountain and said—

3. Thus shalt thou say to the house of Jacob, and tell the children of Israel ;

4. Ye have seen what I did unto the Egyptians, and how I bare you on eagles' wings, and brought you unto myself.

5. Now therefore, if ye will obey my voice indeed, and keep my covenant, then ye shall be a peculiar treasure unto me from among all peoples : for all the earth is mine : and ye shall be unto me a kingdom of priests and a holy nation. These are the words which thou shalt speak unto the children of Israel.

Moses called together the elders and "set before them all these words which the LORD commanded him."

The "people" then formally assented. This portion of the narrative clearly corresponds to the "Let us make a covenant" of the Jacob-Laban agreement. Owing to the fact that this is a covenant between God and twelve tribes, we see the ordinary forms of a witness-covenant expanded, for much of the ceremony is performed with Moses as an intermediary, and in some parts the representation of the people by the elders necessitates a further lengthening of the transaction. Accordingly here we find that the arrangement to enter into a covenant, which in a transaction between two men would be told in a few words, requires six verses of narrative and the intervention of Moses and the elders.

Thereupon certain preparations are made. Their significance is religious, not legal, and in chapter xx. we are told that God spake all these "words." Then follows the Decalogue. Subsequently we are told that, owing to the fear of the people, Moses is made an intermediary. God gives him certain precepts in 22-26, immediately followed by the judgments and other precepts, and finally the quasi-jurat (xxiii. 20 to end).

So far the terms of the proposed covenant, other than the Decalogue, have not been brought before the whole people. Accordingly, in chapter xxiv. Moses tells the people all the "words of the LORD and all the judgments, and the people answer that they will do all the "words" which the Lord had spoken [verse 3]. Moses then writes down all the words of the Lord.

Everything is now ready for the formal covenant ceremony. So the altar and pillars are erected, the book of the covenant is read and formally accepted. Moses, sprinkling blood of the sacrifice, says—

Behold the blood of the covenant, which the LORD hath cut with you on all these words,

and the elders go up, and eat and drink.

We meet with writing in two forms. Moses writes all the words of the Lord, and this constitutes the "book of the covenant." God writes the ten words on the tables of stone as a testimony. Neither document is signed, or in any way marked for identification by both parties. The same remark applies to the "book" and "stones" of Deuteronomy.

A very natural question here suggests itself as to the terms of the covenant. Tremendous emphasis is laid on the Decalogue, but not on the judgments. Why is this? There are no doubt theological reasons, but it seems right to point out once more, that the courts could and would enforce jural laws, but not the terms of the Decalogue. What, then, was to be gained by making jural laws terms of a covenant at all? The answer suggested by modern theories about other systems of ancient law is that in primitive societies the courts are weak, and it is desirable to strengthen the law by every possible means. Hence there was a distinct practical advantage in using the covenant bond to obtain respect and obedience for legal institutions.

The covenant that we have been considering was speedily avoided by the worship of the golden calf, and Moses broke the testimony. In Exodus xxxiv. the covenant appears to be renewed at the supplication of Moses, and a new testimony is provided. As we have no other instance of the renewal of a broken covenant, it is useless to attempt any generalisations. As we should expect, the chapter contains no jural law.

§ 6. DEUTERONOMY

In order to understand the style and structure of Deuteronomy, so far as is material for our present purpose, it is necessary to bear several things in mind :—

1. In one of its aspects the Torah is the perfect adaptation of all worthy means to the end of making holy. Israel regarded as a unit is to be induced to be holy : every Israelite is to be made holy, regarded (*a*) as an individual, and (*b*) as a constituent of the larger unit.

2. Deuteronomy is the crown of the Torah, so regarded.

3. A large portion of the book consists of a covenant document, which, of course, was also a book of law.

4. The book is addressed to the whole people, and is meant *inter alia* for public reading.

The structure of the relevant portions of the book is as follows :—

1. i. 1-5. Five verses of narrative, introducing

2. i. 6-iv. 40. The first speech of Moses, which is a preliminary to placing before the children of Israel the covenant document.

3. iv. 41-43. Three verses of narrative.

4. iv. 44-49. Heading and date of the covenant document.

5. v. 1-xxvi. 19. The covenant document up to the end of the operative part, that is, excluding the quasi-jurat.

6. xxvii. The directions for "executing" the covenant, including the twelve curses.

7. xxviii. The quasi-jurat of the covenant.

8. xxix.-xxx. Second speech of Moses, exhorting the people to observe the covenant, prophesying the accomplishment of the blessing and the curse, and foretelling the future.

Here is the skeleton of an ordinary English deed :—

THIS INDENTURE [is] made the first day of January one thousand nine hundred between A. B. of 1000 Cheapside in the city of London architect of the one part and C. D. of 1001 Cheapside aforesaid gentleman of the other part

WHEREAS [here follow the recitals, that is a statement of the facts which the draftsman thinks it material to insert, and which, but for a recent enactment enabling a draftsman to attain the same object more shortly, would undoubtedly include a recital of any former deed between the same parties dealing with the same subject-matter.]

NOW THIS INDENTURE WITNESSETH [here follow the operative words, *i.e.* the words that effect the object of the deed.]

IN WITNESS whereof the said parties have hereunto set their respective hands and seals the day and year first above written.

The document is then executed—that is, signed, sealed, and attested.

In the document of a Hebrew pillar-covenant we should naturally expect the witnessing part to contain a mitsvah and statutes, and, in place of the “In witness, &c.,” and the attested signatures and seals, we should look for a pillar, an altar, sacrifices, feasting, and, if the covenant were made by God, a quasi-jurat. These things are all present in Deuteronomy.

In Deuteronomy iv. 44 *ff.* we find the following heading:—

44. And this is the torah which Moses set before the children of Israel.

45. These are the testimonies, and the statutes, and the judgments, &c.

It may be that we have a double phrase because of the dual character of the document, for it is both Torah and book of covenant. Next we read—

And Moses called unto all Israel, and said unto them [v. 1].

Then we find what is technically termed a recital of the earlier covenant in Horeb, and certain kindred facts, and in vi. 1 this is followed by the mitsvah, the statutes, and the judgments. It may be added that the practice of reciting earlier legal documents or some portion of

them is earlier than Jacob's migration to Egypt. We have what appears to be an Egyptian will of *circa* 2500 B.C., in which an earlier document is recited. [Griffith : "Hieratic Papyri from Kahun and Gurob," pp. 31-32, 34 ; *Law Quarterly Review*, 1898, pp. 46-47.]

The effect of the covenant appears to be summarised in the culminating words of its operative part.

16. This day the LORD thy God commandeth thee to do these statutes and judgements : thou shalt therefore keep and do them with all thine heart, and with all thy soul.

17. The LORD thou hast avouched this day to be unto thee for a God, and to walk in his ways, and to keep his statutes, and his mitsvoth and his judgements, and to hearken unto his voice ;

18. And the LORD hath avouched thee this day to be unto him for a peculiar people, as he spake unto thee, and to keep all his mitsvoth.

19. And to make thee high above all nations which he hath made, for a [*or in*] praise, and for a [*or in*] name, and for a [*or in*] glory ; and that thou mayest be a people holy unto the LORD thy God, as he hath spoken [xxvi. 16-19].

In the first of these verses we see that, because God commands, Israel is to obey : but in what follows the bilateral idea that is at the root of the covenant is very clearly brought out. If the Lord avouches Israel to be unto Him for a peculiar people, Israel in identical terms avouches the Lord to be unto him for a God. If Israel undertakes duties, God also promises to keep all his mitsvoth, and to make Israel high above all nations.

The directions for executing the covenant are of the usual type, but the twelve curses are of peculiar interest to a lawyer. The last is directed to making the Torah, as a whole, binding on every individual Israelite, as contrasted with Israel. The other eleven supplement the activity of the courts by dealing with offences, the proof of which is for various reasons either impossible or else very difficult. Four of them are aimed at

offences that are notorious for the practical difficulty they occasion to courts. Others expressly deal with offences that are committed "in secret." In others again, as in the case of wrongs done to the blind or the stranger, the difficulty must be obvious to any reader.

In the case of the covenant at Sinai, the Decalogue was written on stone to serve as a "testimony." In the Pentateuch the word עֵד, testimony, is only applied to the Tables, but we perhaps have something similar in Deuteronomy xxxi. 16-xxxii. 47, where a song is taught to testify against the children of Israel, when they break the covenant.

§ 7. THE TOKEN-COVENANT

The first token-covenant is to be found in Genesis ix. I italicise phrases that appear to be of frequent occurrence in covenants of this class.

8. And God spake unto Noah, and to his sons with him, saying,

9. *And I, behold, I establish* my covenant with you, and with your seed after you ;

10. And with every living creature that is with you, the fowl, the cattle, and every beast of the earth with you ; of all that go out of the ark, even every beast of the earth.

11. And I will *establish* my covenant with you ; neither shall all flesh be cut off any more by the waters of the flood ; neither shall there any more be a flood to destroy the earth.

12. And God said,

This is the token of the covenant which I give *between me and you* and every living creature that is with you, for perpetual generations :

13. I do set my bow in the cloud, and it shall be for a *token of a covenant between me and the earth.*

14. And it shall come to pass, when I bring a cloud over the earth, that the bow shall be seen in the cloud,

15. And I will remember my covenant, which is *between me and you* and every living creature of all flesh ; and the waters shall no more become a flood to destroy all flesh.

16. And the bow shall be in the cloud ; and I will look upon it, that I may remember the *everlasting covenant between God and every living creature of all flesh that is upon the earth.*

17. And God said unto Noah,

This is the token of the covenant which I have established between me and all flesh that is upon the earth.

We note the following points :—

(1) The covenant is between two parties ;

(2) It creates, however, a purely unilateral obligation. No duty at all is laid upon Noah.

(3) One of the two parties is silent throughout. His consent is never signified by word or conduct, and appears to be quite unnecessary.

(4) The transaction consists of (*a*) a solemn oath by the Party bound, followed by (*b*) a formal declaration of a token of the covenant.

(5) The token is to consist in an act of the *Party bound*.

(6) The express reason for having a token is that it may serve as a reminder.

The next example is to be found in Genesis xvii :—

3. And Abram fell on his face : and God talked with him, saying,

4. *As for me, behold, my covenant is with thee, and thou shalt be the father of a multitude of nations.*

5. Neither shall thy name any more be called Abram, but thy name shall be Abraham ; for the father of a multitude of nations have I made thee.

6. And I will make thee exceeding fruitful, and I will make nations of thee, and kings shall come out of thee.

7. *And I will establish my covenant between me and thee and thy seed after thee throughout their generations for an everlasting covenant, to be a God unto thee and to thy seed after thee.*

8. And I will give unto thee, and to thy seed after thee, the land of thy sojournings, all the land of Canaan, for an everlasting possession ; and I will be their God.

9. And God said unto Abraham,

And as for thee, thou shalt keep my covenant, thou, and thy seed after thee throughout their generations.

10. This is my covenant, which ye shall keep, *between me and you* and thy seed after thee ; every male among you shall be circumcised.

11. And ye shall be circumcised in the flesh of your fore-skin ; and it shall be *a token of a covenant betwixt me and you*.

12. And he that is eight days old shall be circumcised among you, every male throughout your generations, he that is born in the house, or bought with money of any stranger, which is not of thy seed.

13. He that is born in thy house, and he that is bought with thy money, must needs be circumcised : and my covenant shall be in your flesh *for an everlasting covenant*.

14. And the uncircumcised male who is not circumcised in the flesh of his foreskin, that soul shall be cut off from his people ; he hath broken my covenant.

15. And God said unto Abraham,

As for Sarai thy wife, thou shalt not call her name Sarai, but Sarah shall her name be.

16. And I will bless her, and moreover I will give thee a son of her : yea, I will bless her, and she shall be a mother of nations ; kings of peoples shall be of her.

The token here consists of something to be done by the party benefited by the covenant. The word "covenant" is applied to that which is described as its "token"—that is to say, a word, which denotes the whole transaction, is by a natural transition of thought used of its most characteristic feature. The use of the token as a reminder appears to have been forgotten. In the Noachite covenant, it was used to furnish evidence by association. Here that notion has entirely vanished. In Exodus ii. 24 the covenant is remembered by God. Is it as a result of seeing the token ? No,

God heard their groaning, and God remembered his covenant.

Another instance of a token-covenant occurs in Exodus xxxi. 12-17. The token is enforced by the

death penalty. Throughout, the real object seems to be to secure the observance of the token, and the covenant appears to be little more than a metaphor, so much so, that in Exodus xxxv. Moses does not even mention it.

We are now in a position to understand why, in Leviticus xxvi. 46, we read—

These are the statutes and judgements and teachings, which the LORD made *between him and* the children of Israel in Mount Sinai by the hand of Moses.

Obviously the passage must have something to do with a covenant. Looking at what precedes, we find that a quasi-jurat, which is full of covenant expressions, begins at xxvi. 3, and as in verse 9 the phrase "establish my covenant" is used, it is clear that we have to do with a token-covenant. Yet we are not told of any new covenant being made, and if we were inclined to guess that something had fallen out, the language of the passage would be quite unintelligible; for it is manifest from verse 42 that the covenant is not altogether new.

Then will I remember my covenant with Jacob; and also my covenant with Isaac, and also my covenant with Abraham will I remember; and I will remember the land.

So this covenant goes back in some way to Abraham, and is concerned with the land. Looking back to the great token-covenant with Abraham, we see that by it the land of Canaan is actually promised to him.

7. And I will establish my covenant between me and thee and thy seed after thee throughout their generations for an everlasting covenant, to be a God unto thee and to thy seed after thee.

8. And I will give unto thee, and to thy seed after thee, the land of thy sojournings, all the land of Canaan, for an everlasting possession; and *I will be their God* [Genesis xvii.].

This reminds us that the quasi-jurat in Leviticus ends with the words—

45. But I will for their sakes remember the covenant of their ancestors, whom I brought forth out of the land of Egypt in the sight of the nations, *that I might be their God* : I am the LORD.

But Isaac and Jacob are mentioned as well as Abraham. Had not God appeared to each of them and confirmed the covenant? In Isaac's case we are told—

2. And the LORD appeared unto him, and said,
Go not down into Egypt ; dwell in the land which I shall tell thee of :

3. Sojourn in this land, and I will be with thee, and will bless thee ; for unto thee, and unto thy seed, I will give all these lands, and I will establish the oath which I sware unto Abraham thy father ;

4. And I will multiply thy seed as the stars of heaven, and will give unto thy seed all these lands ; and in thy seed shall all the nations of the earth be blessed ;

5. Because that Abraham hearkened unto my voice, and kept my charge, my mitsvoth, my statutes, and my teachings [Genesis xxvi.].

And to Jacob the promise of the land was twice confirmed [Genesis xxviii. 13-15 ; xxxv. 11, 12]. Indeed, in Exodus ii. 24 we read—

God remembered his covenant with Abraham, with Isaac, and with Jacob.

Turning now to what precedes the quasi-jurat, we find that, in Leviticus xxv. 2, a body of commandments and laws opens with the words—

When ye come into the land which I give you.

And what is the subject-matter of these commandments and laws? The whole chapter is devoted to an agricultural regulation, the jubile and land laws, and

laws which, as we saw when considering the law of debt, are naturally grouped with them. We see how fitting it is that such laws should be treated as terms of the agreement under which Israel obtained the land. Then chapter xxvi. opens with the verses :—

1. Ye shall make you no idols, neither shall ye rear you up a graven image, or a pillar, neither shall ye place any figured stone *in your land*, to bow down unto it : for I am the LORD your God.

2. Ye shall keep my sabbaths, and reverence my sanctuary : I am the LORD.

Anybody who reads the quasi-jurat in the light of what has been said will see how marvellously appropriate it is. Observance of the statutes and mitsvoth will be rewarded with blessings in and to the land. The opposite results will follow if they be broken. "The land of your enemies shall eat you up." No reference is made to the jural laws which would be enforced by the courts ; but great stress is laid on the observance of the agricultural regulation and the prohibitions of idolatry.

30. And I will destroy your high places, and cut down your sun-images, and cast your carcasses upon the carcasses of your idols ; and my soul shall abhor you.

31. And I will make your cities a waste, and will bring your sanctuaries unto desolation, and I will not smell the savour of your sweet odours.

32. And I will bring the land into desolation : and your enemies which dwell therein shall be astonished at it.

33. And you will I scatter among the nations, and I will draw out the sword after you : and your land shall be a desolation, and your cities shall be a waste.

34. Then shall the land enjoy her sabbaths, as long as it lieth desolate, and ye be in your enemies' land ; even then shall the land rest, and enjoy her sabbaths.

It is impossible to define accurately the attitude of Moses and his contemporaries towards the covenant

with Abraham. All we can say is that probably the contents of Leviticus xxv. and xxvi. were regarded as being in some way connected with it. It would be foolish to assert dogmatically that the covenant was renewed, confirmed, or modified. Probably the Israelites simply felt that these commandments were laid upon them in virtue of the covenant with Abraham, and did not stop to analyse the exact relation in which they stood to that treaty.

§ 8. ISAIAH AND JEREMIAH

A fine passage in Isaiah xix. now acquires fresh force—

18. In that day there shall be five cities in the land of Egypt that speak the language of Canaan, and *swear* to the LORD of hosts. . . .

19. In that day shall there be an *altar* to the LORD in the midst of the land of Egypt, and a *pillar* at the border thereof to the LORD.

20. And it shall be for a *token* and for a *witness* unto the LORD of hosts in the land of Egypt : for they shall cry unto the LORD because of the oppressors, and he shall send them a saviour, and a great one, and he shall deliver them.

21. And the LORD shall be known to Egypt, and the Egyptians shall know the LORD in that day, and *shall do sacrifice and oblation*, and shall *vow a vow* to the LORD and perform it. . . .

24. In that day shall Israel be the third with Egypt and with Assyria, a blessing in the midst of the earth :

25. Whom the LORD of hosts shall bless, saying, Blessed be *my people*, Egypt, and the work of my hands, Assyria, and mine inheritance, Israel.

The combination of swearing, altar, pillar, token, witness, sacrifice, and oblation, leaves no doubt as to the covenant ideas that form the background of this beautiful passage. "Egypt," says the prophet, "shall also become My people. The Egyptians, too, shall enter into a pillar-covenant with Me, as did the twelve tribes ; they

too shall be bound to me as closely as though they were children of the covenant with Abraham and the covenant at Sinai. Then shall Egypt be a third with Assyria, which is bound to Me not by a covenant, but through being the work of My hands, and with Mine inheritance Israel."

We come lastly to the age of Jeremiah. A special interest attaches to this period, because it was then that a book of Torah was discovered, and some critics assert that it was then that the bulk of Deuteronomy was written. It is therefore peculiarly instructive to contrast the legal ideas of the Mosaic age with those of Jeremiah and his contemporaries. We have seen the state of development of the ideas of evidence in the former period and the part played by unauthenticated writing. Now let us turn to Jeremiah xxxii., where we have a description of a conveyance :—

9. And I bought the field that was in Anathoth of Hanamel, mine uncle's son, and weighed him the money, seventeen shekels of silver.

10. And I subscribed the deed, and sealed it, and called witnesses, and weighed the money in balances.

11. And I took the deed of the purchase, that which was sealed, the mitsvah and the statutes, and that which was open :

12. And I gave the deed of the purchase unto Baruch the son of Neriah, the son of Mahseiah, in the presence of Hanamel mine uncle's son, and in the presence of the witnesses that subscribed the deed of the purchase, in the presence of all the Jews that sat in the court of the prison. . . .

14. Take these deeds, this deed of the purchase, both the sealed [*sc.* deed], and this open deed, and put them in an earthen vessel ; that they may continue many days.

No comment is necessary as to the change since the days when a pillar could witness, because it had heard. I have only to point out that such a change cannot be the work of a day, or a year, or a reign. We meet with a torah sealed among disciples in Isaiah [viii. 16].

There is another change in thought which is of great

interest. In Mosaic times a literal entry into a covenant was the safest foundation for a new religion. Contrast with that the following passage in Jeremiah xxxi. :—

31. Behold the days come, saith the LORD, that I will cut with the house of Israel and with the house of Judah a new covenant :

32. Not according to the covenant that I cut with their fathers in the day that I took them by the hand to bring them out of the land of Egypt ; which my covenant they brake, although I was an husband unto them, saith the LORD.

33. For this is the covenant that I will cut with the house of Israel : after those days, saith the LORD, I will put my torah in their inward parts, and in their heart will I write it ; and I will be unto them for a God, and they shall be unto me for a people :

34. And they shall not teach any more every man his neighbour, and every man his brother, saying, Know the LORD : for all of them shall know me, from the least of them unto the greatest of them, saith the LORD : for I will forgive their iniquity, and their sin will I not remember any more [30-33 in Hebrew].

It is not too much to say that the covenant of this passage stands in much the same relation to the covenants of the Pentateuch as does a lady's chain bracelet to real fetters.

CHAPTER III

SOME PROOFS OF DATE

BEFORE commencing the study of any legal rules, it is necessary to point out that there was Israelite law before Moses. The Bible shows us an Israelite organisation, established in a separate territory, and ruled in part by elders and officers. Moreover, all the documents of the critics presuppose an existing body of law, and we already know enough of Egyptian law to be able to say that the law of Exodus is very much more primitive than the law of Egypt can have been at any period covered by the history of Israel. Historical jurists have of course long been accustomed to regard the Roman empire as the first state which legislated for subjects who were not natives,¹ but Biblical students have not yet grasped the bearing of this fact on the critical arguments.

The first passage I propose to consider is Leviticus xxiv. 10-23, which narrates the case of the son of Shelomith, and the momentous judgment that was then delivered. There had come up out of Egypt with the children of Israel a man who was the son of an Egyptian father and an Israelite mother, named Shelomith. This man, while fighting with an Israelite, blasphemed the name of God, and was brought to Moses, and put in ward till the law should be declared.

¹ See Maine, "Early History of Institutions," Lectures xii. xiii.; and *cf.* Sayce, "Early History of the Hebrews," p. 57, from which it appears that in Babylonia foreigners had settlements, where they were judged by their own magistrates.

The text then continues—

13. And the LORD spake unto Moses, saying,

14. Bring forth him that hath cursed without the camp ; and let all that heard him lay their hands upon his head, and let all the congregation stone him.

15. And thou shalt speak unto the children of Israel, saying, Whosoever curseth his God shall bear his sin.

16. And he that blasphemeth the name of the LORD, he shall surely be put to death ; all the congregation shall certainly stone him : as well the stranger, as the homeborn, when he blasphemeth the Name, shall be put to death.

17. And he that smiteth any man mortally shall surely be put to death,

18. And he that smiteth a beast mortally shall make it good : life for life.

19. And if a man cause a blemish in his neighbour ; as he hath done, so shall it be done to him ;

20. Breach for breach, eye for eye, tooth for tooth : as he hath caused a blemish in a man, so shall it be rendered unto him.

21. And he that killeth a beast shall make it good : and he that killeth a man shall be put to death.

22. Ye shall have one manner of law [*Hebrew* : one judgment-law shall there be to you], as well for the stranger, as for the homeborn : for I am the LORD your God.

The man was accordingly put to death.

The first difficulty in the case was that the law of blasphemy had not yet been declared. So much is obvious to everybody. But it is not from this that the case derived its importance. The chief difficulty was due to the fact that the criminal was not a member of any Israelite tribe, nor a party to the great agreements between Israel's God and Israel. We are so accustomed to regard the law of a civilised state as applicable to all persons within its territory, that we forget how rare and modern the idea is.

In early societies, quite apart from religious considerations, law is personal, not territorial.

After the fall of the Roman Empire, Romans, Franks, Burgundians and so forth were governed by their respective laws within the same territory [Westlake: "Private International Law," 3rd edition, 288].

A fortiori, where law is implicated with religion, legal history shows that it is generally felt to be impossible to apply the law to strangers.

In India it is still the case that—

The members of certain castes and creeds are, in many important respects, governed by their own peculiar rules and customs [13 App. Ca. 440].

As matter of history I should doubt whether anything that could properly be called a general law for British India existed before the commencement of that great series of British Indian legislation which was inaugurated by Macaulay. Previous to that time I can only discover the laws of the castes and creeds, and alongside of them and standing on the same footing with them, for the community or society formed by the Europeans, English law, more or less modified by special enactments [Westlake, *op. cit.*, 289-290].

It is unnecessary to multiply examples, but my readers will probably thank me for the following quotation :—

Some time in the year 1886 a deputation arrived from the Jews of Aden, asking that they might be exempted from the operation of the Indian Succession Act (X. of 1865). That Act applied to the Jews of British India, a small class of persons. Aden is technically part of British India. Therefore the Act applied to the Jews of Aden. But for some twenty years the Jews of Aden remained in blissful ignorance of its existence. At last a case raising a question of succession among Aden Jews found its way into the Civil Court at Aden. The judge looked up his law and found that the Succession Act regulated the case. His decision fluttered the community, and they asked that they might be restored to their old law. On inquiry what that law was, reference was made to a passage in the Book of Numbers, containing what may without profanity be called the ruling in Zelophehad's case. The text lays down the rule of succession to be observed when an

Israelite dies leaving daughters but no son. It was stated that the Jews of Yemen had been under this law for some thousands of years, that it gave them what they wanted, and that they would like to remain under it. Under these circumstances the Government of India stipulated for two conditions—first, for evidence of the particular customs of the Yemen Jews, and, secondly, for an assurance that any exemption granted to them should not be used as a precedent for granting a similar concession to the Jews of India generally. The stipulations were complied with by the production of evidence as to the laws and customs of Yemen Jews (very curious and interesting evidence it was), and by an undertaking from the leading Jews in British India that they would be content to remain under Anglo-Indian law. And the Jews of Aden were accordingly allowed to revert from Act X. of 1865 to the Pentateuch [Ilbert: "Legislative Methods and Forms," 153-154].

This explains the structure of the judgment. First the law of blasphemy is laid down [verses 15 and 16], then it is declared to be applicable to stranger and native alike [verse 16, *fin.*], then certain important branches of law are epitomised, and the general principle that the same law is to apply to stranger as to native is asserted in clear, unmistakeable language.

What place this judgment occupies in the history of Israelite law may best be seen by a comparison with Roman law.

At Rome the necessity of providing law for strangers twice caused a duplication of legal institutions. At an early date the growth of the *plebs*, side by side with the *populus* or *patres*, necessitated the invention of legal contrivances, which could in some measure replace for them institutions of the original civil law which were applicable only to the *patres*. Hence even with our scanty knowledge of early Roman law, we hear of a form of marriage and a form of testament, devised to do for the *plebs* something like what the early civil law did for the *populus*. Subsequently, the necessity for

dealing with cases in which one or both parties were not Roman citizens, and of enabling persons, to whom the *jus civile* was not applicable, to enter into contracts, led to the creation of a *jus gentium*, which for a long time existed side by side with the civil law. Where a *peregrinus* was a party to a case, this *jus gentium* was administered by a special magistrate, and had a long and eventful history, extending over many centuries, during the course of which it profoundly modified the original civil law. The judgment in the case of Shelomith's son saved Israel this experience, and it must rank at the very head of the world's ruling cases.

We must next deal with certain points of style. It will be noticed that the great declaration of legal principle is throughout couched in the third person. Observation shows that the genius of the language favours the use of the third person in the operative words of jural laws. This may be strikingly illustrated in a variety of different ways. The judgment-laws of Exodus come just after precepts that are couched in the second person. They start off with the words: "If thou buy an Hebrew servant." We might expect "thou shalt" to follow, and in the corresponding passage of Deuteronomy [xv. 12], which, as we know, is not a judgment-law, we actually find "thou shalt let him go free," although the verb of the protasis is there in the third person (if thy brother be sold unto thee), but in Exodus we read "he shall serve thee." We are then kept consistently in the third person till we reach xxi. 23; here we find "thou shalt give life for life," &c. This seems to be addressed to the offender rather than the judges. We then revert to the third person, till we come to xxii. 18, where we read—

Thou shalt not suffer a sorceress to live.

At first sight this looks as if it were a rule intended

for the guidance of courts as well as individuals, but it is noticeable that we are not told how the death penalty is to be inflicted. No doubt we find such judgment-laws as "he that smiteth his father shall surely be put to death," but we may conjecture that to a contemporary the meaning of the Hebrew phrase rendered "shall surely be put to death" was as clear as "shall be executed" would be to a modern Englishman. On the other hand we do find in Leviticus xx. 27 the following unmistakeable jural law:—

A man also or a woman that hath a familiar spirit, or that is a wizard, shall surely be put to death: they shall stone them with stones: their blood shall be upon them.

Exodus then reverts to the third person, but speedily returns to the second in xxii. 21 with a number of precepts, the observance of which is inculcated with such phrases as, "for ye were strangers in the land of Egypt," and "it shall come to pass, when he crieth unto me, I will hear."

It is unnecessary to labour the point with further illustrations. We may conclude first, that the second person is appropriate to what analytical jurists call occasional commands, secondly, that in general commands the third person is usual where a rule is being laid down for the guidance of a court, priest, or other authority, while in other cases, and especially where there is an appeal to the feelings of an individual, the second person is preferred. Of course we frequently find substantially the same precepts put from different points of view, and in Deuteronomy, owing to its popular character, the second person is generally preferred. It must never be forgotten that language is in part a lawgiver's master, but to a greater extent his servant.

The following passage from a work of Sir Henry Maine's suggests a further stylistic enquiry:—

The law-book of Manu is in verse, and Verse is one of the expedients for lessening the burden which the memory has to bear when writing is unknown or very little used. But there is another expedient which serves the same object. This is Aphorism or Proverb. Even now, in our own country, much of popular wisdom is preserved either in old rhymes or in old proverbs; and it is well ascertained that during the Middle Ages much of law and not a little of medicine was preserved among professions, not necessarily clerkly, by these two agencies. A great deal of old German law compressed into maxims has been preserved, and it is probable that the Latin legal maxims well known to English lawyers, and sometimes spoken of as the quintessence of wisdom, were really aids to recollection. As to Verse, the ordinary medical practitioner once carried his professional knowledge with him in the versified Latin rules of the school of Salerno—that curious body of medical precepts which begins with the grim warning, *contra vim mortis non est medicamen in hortis* . . . The Sanscrit law-books are sometimes in aphoristic prose, sometimes in verse, sometimes in a mixture of both [Maine: "Early Law and Custom," 9-10].¹

What is there in Hebrew literature that corresponds to the Indian aphorism?

The fundamental (and predominant) form of the Hebrew verse is the couplet of two lines, the second line either repeating, or in some other way reinforcing or completing, the thought of the first. In the verse of two lines is exemplified also the principle which most widely regulates the form of Hebrew poetry, the *parallelismus membrorum*—the parallelism of two clauses of approximately the same length, the second clause answering, or otherwise completing, the thought of the first [Driver: "Literature of the Old Testament, 362].

Dr. Driver subsequently points out that there are various kinds of parallelism. One variety is distinguished by the fact that the two lines are practically

¹ For Irish and Greek parallels, cf. Maine, "Early History of Institutions," 14.

synonymous, the second enforcing the thought of the first, in another the two members are antithetic and contrast with each other, while in a third class "the second line contains neither a repetition nor a contrast to the thought of the first, but in different ways supplements or completes it." Parallelism is characteristic of Hebrew poetry and proverbs, but it is also found in the prose of the prophets. It is noteworthy that the song which was taught to the children of Israel (Deuteronomy xxxi. 30-xxxii. 44) abounds in examples of parallelism. Now parallelism is not as a rule well adapted to the expression of jural law. To say the same thing twice over in different words is generally dangerous when those words have to be interpreted by courts, but there are exceptions to every rule, and one of these occurs when the object is not to make new law, but to summarise law that is already well known.

*poetry
also*

In Sir William Jones's day, an abridgment of Lord Coke's "Reports" in verse was in existence; and he gravely remarks that, if the verse had been smoother and the law more accurate, every student might have been advised to use it [Maine: "Early Law and Custom," 10].

Again, it is sometimes the case that a legislator desires to lay down rules relating to different cases that closely resemble each other, but are not precisely the same, as, for instance, cursing God and blaspheming the Name. Hence in this judgment we find instances of parallelism:—

1. Whosoever curseth his God shall bear his sin,
2. And he that blasphemeth the name of the LORD, he shall surely be put to death.
1. And he that smiteth any man mortally shall surely be put to death,
2. And he that smiteth a beast mortally shall make it good.

In commands the use of parallelism is of course more frequent.

If thou lend money to any of my people with thee that is poor,

1. Thou shalt not be to him as a creditor,
2. Neither shall ye lay upon him usury [Exodus xxii. 25 (24)].

1. Judges thou shalt not revile,
2. And a prince in thy people thou shalt not curse [Exodus xxii. 28 (27)].

1. Ye shall not round the corners of your heads,
2. Neither shalt thou mar the corners of thy beard [Leviticus xix. 27].

In speaking of parallelism in Hebrew poetry, Dr. Driver says—

The Hebrew verse does not, however, consist uniformly of two lines; the addition of a third line is apt especially to introduce an element of irregularity: so that the *parallelismus membrorum*, though an important canon of Hebrew poetry, is not the *sole* principle by which its form is determined [“Literature of the Old Testament,” 362].

Similar irregularities may be noticed in Leviticus—

Ye shall keep my statutes.

1. Thou shalt not let thy cattle gender with a diverse kind:
2. Thou shalt not sow thy field with two kinds of seed:
3. Neither shall there come upon thee a garment of two kinds of stuff mingled together [Leviticus xix. 19].

And when ye reap the harvest of your land,

1. Thou shalt not wholly reap the corners of thy field,
 2. Neither shalt thou gather the gleanings of thy harvest.
 1. And thou shalt not glean thy vineyard,
 2. Neither shalt thou gather the fallen fruit of thy vineyard;
- Thou shalt leave them for the poor and for the stranger: I am the LORD your God [xix. 9-10].

The nineteenth chapter of Leviticus is in a style that suggests comparisons with Hebrew poetry, and the superscription is, “*Speak unto all the congregation of the*

children of Israel," a fact which is probably of considerable importance to the stylistic enquiry. I do not propose to pursue this subject further; all I desire to establish is that there is a case for examining the style and structure, at any rate of the passages that contain judgments and commandments, in the light of such knowledge of Hebrew poetry as we possess.

In form the laws of the tables were of remarkable brevity, terseness, and pregnancy, with something of a rhythmical cadence that must have greatly facilitated their retention in the memory [Muirhead: "Roman Law," 100].

The same remark holds good, not merely of the judgment now under consideration, but also of other passages, such as the judgments in Exodus and the declaration of law in the case of the daughters of Zelophehad. For instance, in the original Hebrew, verse 21 is expressed in six words. Or take Genesis ix. 6—

Whoso sheddeth man's blood, by man shall his blood be shed.

We can all see that the pointedness of the phrase makes it easy to remember; but in Hebrew it only requires six words for its expression, and they are arranged in such a way as to present a remarkable instance of the figure that grammarians call *chiasmus*, thus—

Shedding blood-of man by-man his-blood shall-be-shed.

And the sentence is moreover distinguished by very noticeable assonance.

Again such phrases as "tooth for tooth" must have been singularly easy to remember. Lastly; we may conjecture that the retention of law in the memory was aided by a system of chanting.

It must be remembered that the legal portions of all

the documents of the critics, except of course D, resemble one another in showing well-known characteristics of early legal style in contrast to the narrative with which they are connected. Perhaps such facts as these throw at least as much light on the state of preservation of the Hebrew text as many ancient mis-translations.

Lastly, we come to the question of the date of the passage. On this no two opinions are possible. Such a judgment as this could only have been given at a time when it was uncertain what law should be applied to strangers, and that is a question which is bound to come up for settlement at a very early date in the independent history of any nation. So obvious does this appear that I shall not trouble to cite the evidence of the historical books. But we can of course carry the argument further. Could such a judgment have been forged in any post-Mosaic age? Obviously not; for it would have been utterly meaningless in any period when Israelite law was applied as a matter of course to a criminal of foreign origin. The thoroughness with which this judgment did its work made it certain that its meaning would soon be forgotten, and the passage must have been as unintelligible in the post-exilic times, to which the critics assign it, as it has proved to all subsequent commentators. It has never been suggested either that the supposititious literary forgers of the critics were capable of manufacturing a system of ancient law which would bear the test of comparison with the genuine systems of early societies, or that they desired to pass off on their contemporaries a body of law which was obsolete and unintelligible, or that their contemporaries would ever have accepted such forgeries as intelligible, useful, or genuine.

I come next to the evidence of date afforded by the land laws in the twenty-fifth chapter of Leviticus. It is

quite clear that a nation that occupies land must have some kind of land law. The critics must therefore say either that at the date to which they attribute this passage these laws were actually in force or that they were not ; and in the latter case they must go further, and say that some other body of law (of which we, of course, know nothing) was in actual operation. They assume that these laws were in fact invented at a late date. But a very few sentences are sufficient to show the absurdity of this view. For the sake of clearness I shall confine myself to the jubile law, but the same arguments apply to the other provisions respecting immovable property. It is not possible with a few strokes of a forger's pen to abolish a whole system of law that *ex hypothesi* had been working for many centuries. If the jubile had not been the law of the land, a whole system of complicated provisions for the repeal of the old law and the bringing into operation of the new would have been necessary. The practical difficulties of revolutionising the land law of a country are always enormous ; but to suppose that such a revolution could be effected without repealing or altering the old law, or making any provision for the innumerable difficulties that would arise the moment it was attempted to bring the new law into operation, and that simply by forging a few sentences, and attributing them to a legislator who had been dead for many centuries, is to conceive an utter impossibility. But even apart from this, how do the critics suppose that anybody would have believed the forgers who asserted that this law was Mosaic ? Must it not have been common knowledge that the jubile law neither was nor ever had been the law of the land ? And, putting this too aside, what motive can the forgers possibly have had ? Was it to protect the peasants, who had been gradually compelled to sell their small holdings to the rich ? But, unless there had first been a redistribution of the land, such a law would

only have operated to the advantage of the rich. *They* would have been the owners, who would have returned to their possessions at the end of every fifty years—those possessions of which they had acquired the absolute ownership in days when no jubile law existed. On these grounds it is confidently submitted that these laws can only be attributed to the Mosaic age.

It has been generally assumed that the jubile law never came into actual operation. The evidence is to the opposite effect. The book of Ezekiel contains two passages which are unintelligible unless the jubile law was actually working. In the seventh chapter we read—

12. The time is come, the day draweth near: let not the buyer rejoice, nor the seller mourn: for wrath is upon all the multitude thereof.

13. *For the seller shall not return to that which is sold*, although they be yet alive: for the vision is touching the whole multitude thereof, none shall return; neither shall any strengthen himself in the iniquity of his life.

And in the forty-sixth chapter the following passage occurs:—

16. Thus saith the Lord God: If the prince give a gift unto any of his sons, it is his inheritance, it shall belong to his sons; it is their possession by inheritance.

17. But if he give of his inheritance a gift to one of his servants, it shall be his to *the year of liberty*; *then it shall return to the prince*; but as for his inheritance, it shall be for his sons.

Could Ezekiel have written thus if the jubile had not been in full operation?

In both these passages the reference is clear and unmistakeable: the book of Ruth contains some words which, although they do not directly refer to the institution, are unintelligible unless it existed. In the Pentateuch we are not told what interest, if any, a widow had

in the land of her deceased husband, but in the book of Ruth we find that Naomi and Ruth clearly had some rights, for in the fourth chapter the following dialogue between Boaz and the near kinsman (*Hebrew*: redeemer) occurs :—

3. And he said unto the redeemer, Naomi, that is come again out of the country of Moab, selleth the parcel of land, which was our brother Elimelech's :

4. And I thought to disclose it unto thee, saying, Buy it before them that sit here, and before the elders of my people. If thou wilt redeem it, redeem it : but if thou wilt not redeem it, then tell me, that I may know : for there is none to redeem it beside thee ; and I am after thee. And he said, I will redeem it.

5. Then said Boaz, What day thou buyest the field of the hand of Naomi, thou must buy it also of Ruth the Moabitess, the wife of the dead, to raise up the name of the dead upon his inheritance.

6. And the redeemer said, I cannot redeem it for myself, *lest I mar mine own inheritance* : take thou my right of redemption on thee ; for I cannot redeem it.

Up to a certain point this passage is quite easy to understand. The redeemer had under the Mosaic law [Leviticus xxv. 25] a right of redemption, and in practice this no doubt often became a right of pre-emption, that is, the property was offered in the first instance to the redeemer. In this case the redeemer was quite willing to buy the land, till he heard that it would be necessary to contract a levirate marriage with Ruth. Then he refused, lest he should mar his own inheritance. But why should the marriage have that effect, unless the jubile law was in operation? The child who might be born would in law be the child of Ruth's first husband [Deuteronomy xxv. 6], and would not therefore inherit from the redeemer. He might, of course, inherit the money paid for the land, but this would not impoverish the redeemer's inheritance, if the absolute property in

Elimelech's land passed by the sale. The answer seems to be that at the jubile the land would revert to the child as Elimelech's heir, and in this way the redeemer would lose the amount of the purchase-money without being compensated by the permanent acquisition of the land.

There is no ground for surprise at the discovery that the jubile law probably worked quite smoothly. It would seem that Moses expected this, for in the quasi-jurat of the land covenant no special reference is made to the jubile. We know from the case of Zelophehad's daughters in Numbers xxxvi. that the people realised what the jubile meant, and it was immensely to the pecuniary advantage of the majority of landholders that the law should never be allowed to become a dead letter. Nor would the need for remembering genealogies for fifty years be likely to cause much inconvenience in practice. In a small country village there are always a number of old people who are acquainted with two or three generations of the genealogies of all their neighbours; and once writing became common, and regular registers of genealogies were kept, there could be no possible difficulty.

Happy the nation that has no history. The chronicles of Israel tell of no *seisachtheia*, no secession of the plebs, no struggles for social or constitutional changes rendered imperative by the harsh working of an unjust law. Once the cruel exactions of the monarchy combine with other causes to rend the house of Israel in twain, but we never hear of any social upheaval. The main reason for this must be sought in the successful operation of the jubile laws.

The story of the daughters of Zelophehad in Numbers xxvii. 1-11 and xxxvi. 1-12 affords equally cogent evidence of date. The following general rules are laid down:—

8. And thou shalt speak unto the children of Israel, saying, If a man die, and have no son, then ye shall cause his inheritance to pass unto his daughter.

9. And if he have no daughter, then ye shall give his inheritance unto his brethren.

10. And if he have no brethren, then ye shall give his inheritance unto his father's brethren.

11. And if his father have no brethren, then ye shall give his inheritance unto his kinsman that is next to him of his family, and he shall possess it: and it shall be unto the children of Israel a statute of judgement, as the LORD commanded Moses [Numbers xxvii.].

It is not necessary to repeat the reasoning by which the date of the land laws was established. Obviously the cases contemplated by this passage are all of daily occurrence in every large community. But one other point should be made. What forger would have invented such a story as this and cut it into two parts?

These examples have all been taken from the supposititious priestly and holiness documents, which the higher critics allege to be the last in order of date. It would of course be possible in many instances to prove the Mosaic date of the jural laws literally precept upon precept, precept upon precept, line upon line, line upon line, here a little, there a little: but in view of what we now know of the higher criticism, it would be a mere waste of labour to attempt the task. "The dog it was that died."

CHAPTER IV

SOME INTERESTING PARALLELS

"THE most celebrated system of jurisprudence known to the world begins, as it ends, with a Code." It is with these words that Sir Henry Maine opens his famous treatise on Ancient Law. He is of course writing of the XII Tables and the Corpus Juris; but Jewish law also begins and ends with codes. The jurist who should institute an exhaustive comparison between Digest and Talmud would render an important service alike to Jewish history and to the comparative study of law. This chapter is concerned merely with the noting of a few parallels to the Pentateuch in early Roman law. Unfortunately only some incomplete fragments of the XII Tables are left to us: but what is known of these fragments is from our present point of view extremely interesting and suggestive, and I desire to put before my readers some facts that have been noticed by the jurists who have dealt with Roman law. So far as practicable, I shall quote the actual words of writers whose labours and insight have made it possible for me to throw light on Biblical problems. I can supply no better introduction to the subject than the following extract from another work of Sir Henry Maine's:—

There is no system of recorded law, literally from China to Peru, which, when it first emerges into notice, is not seen to be entangled with religious ritual and observance. The law of the Romans has been thought to be that in which the civil and Pontifical jurisprudence were earliest and most completely disentangled. Yet the meagre extant fragments of the Twelve

Tables of Rome contain rules which are plainly religious or ritualistic :—

Thou shalt not square a funeral pile with an adze.

Let not women tear their cheeks at a funeral.

Thou shalt not put gold on a corpse.

We are told by Cicero (*De Legibus*, 2, 25, 64) that several of these rules contained in the Tenth of the Roman Tables were taken from Greek originals. He attributes the Greek rules to Solon, and explains that they limited the costliness of the ancient ritual of funerals ["Early Law and Custom," 5-6].

There is a tradition that a commission left Rome for the purpose of studying and collating various foreign laws, and that on its return the decemviri drew up the laws of the tables with the help of this foreign material. The best opinion of modern jurists on this point supplies an instructive comment on views that are held by some Biblical students.

The tradition of the visit to Greece is likely enough to be true, but it is quite a mistake to infer that the decemvirs imported to any considerable extent into the Tables, Greek or any other foreign laws. It is foolish to infer this from a few similarities which have been noticed between Greek and Roman law. Such similarities are only to be expected in the laws of two peoples so closely allied. As Puchta says, the similarities in the Greek and Latin languages are far more striking, yet no one suggests that commissioners were sent from Rome to bring in Greek words [Walton: "Introduction to Roman Law," 83].

Turning to specific rules of law we notice that in the case of deposit the XII Tables gave twofold restitution to the owner who had suffered (Paul, *Sententiæ* II. 12, § 11), and that the action so given is now thought to have been delictual and not contractual [Professor Goudy in Muirhead's "Roman Law," 136 *n.*]. This of course reminds us of Exodus xxii. 7-9. Moreover, the provisions of the Mosaic law of theft (Exodus xxii. 1-4) can be paralleled from Roman law.

The punishment provided by the law of the Twelve Tables for theft detected in the commission (*furtum manifestum*) was capital; a freeman was first scourged and then delivered, by judgment of the magistrate, to the person from whom he had stolen (whether made a slave by the delivery, or reduced to the condition of an insolvent judgment debtor, was an old question); a slave was also punished by scourging. Later ages disapproved of the severity of this punishment, and theft, whether by a slave or by a freeman, was punished by the prætorian edict with fourfold damages. Simple theft (*furtum nec manifestum*) is punished by the law of the Twelve Tables with double damages, which penalty the prætor has retained [Gaius, III. §§ 189-190, Poste's translation].

Mr. Poste offers the following explanation:—

The reason why *furtum manifestum* was subjected to a heavier penalty than *furtum nec manifestum* was not because the barbarous legislator supposed that detection in the act was an aggravation of the offence, but because he wished, by the amplitude of the legal remedy offered, to induce the aggrieved party not to take the law into his own hands and inflict summary vengeance on the offender, particularly as it was lawful to kill a nocturnal thief, or one who during the day defended himself with a weapon. In the infancy of society it is an important object to the legislator to induce an injured person to have recourse to the public tribunals instead of righting himself, that is to say, constituting himself both lawgiver and judge.

That such was really the motive of the legislator we have historic evidence in the declaration of Rotharis, ruler of the Langobards, A.D. 643. He gives the relatives of the slain their election between the primitive vengeance for blood (feud or vendetta), and a composition or pecuniary fine (wergeld or pœna) to be recovered by action before the public tribunals. He says that he fixes a high fine in order to induce plaintiffs to forego their right of feud; and implies that he would gladly have abolished the right of feud or private war, but felt that it was too deeply rooted in the habits of his tribe to be extirpated by legislation [Poste's "Gaius," 3rd ed., 434-435].

The Roman law of injuries to person was also similar in some respects to the Mosaic.

The penalty of outrage in the Twelve Tables for a limb broken was retaliation (*talio*): for a bone broken or bruised three hundred asses, if the person injured was a freeman; one hundred and fifty if he was a slave: for other injuries twenty-five asses: and in those days of excessive poverty such sums seemed an adequate reparation. The rule now in use is different: the plaintiff is permitted by the prætor to put his own estimation on the outrage, and the jūdex may either condemn the defendant in the whole of this sum, or in a lesser sum at his discretion [Gaius, III. §§ 223-224, Poste's translation].

Mr. Poste cites an imperial constitution of the year 389, which was intended to repress violence, and will be found in Cod. VIII. 4, 7, and continues thus—

This constitution may be regarded as the final blow struck by the Roman legislator at the archaic form of remedial procedure—private violence or self-redress. In archaic society, if society it could be called, before the establishment of central authority, public tribunals, and police or executive functionaries, such was the only possible means of redress; and such redress was recognized and permitted by primeval law, if the sentiments of the tribe at such a period can be called by the name of law.

Among the German races the disorder implied by the toleration of Feud or private war was gradually mitigated by the introduction of certain Truces, or temporary or local Peaces: the Truce of the King, prohibiting private war within the precincts of the royal residence: the Truce of the Church, giving to the fugitive wrong-doer an asylum in the sanctuary: the Truce of the Assembly, excluding the prosecution of feuds from the place where the Hundred was assembled: and the Truce of the Town, Village, or House, protecting the offender from homicidal attack within these limits.

At some period, too, society interposed and offered to act as arbitrator, and to procure for the aggrieved party satisfaction of the wrong he had endured. Accordingly all injuries were rated at a certain tariff, and a person who had suffered aggression had the option whether he should avenge himself or, in commutation of his right of Feud, accept the fine fixed by this tariff, and awarded by a tribunal of his countrymen. This mediation of the community, which the plaintiff could

accept or decline at his discretion, was the origin of *actiones penales*, the poena being the inducement offered to the plaintiff to make him adopt the more peaceful course. In Saxon law the alternative offered to the aggressor was expressed by the maxim *Biege spere of side other bere*: "Buy the spear off the side or bear it:" *i.e.* make atonement or be liable to Feud [Poste's "Gaius," p. 441].

The Hebrew law of homicide stands in an interesting relation to the life of Moses. His first noteworthy action had been to kill an Egyptian, whom he saw smiting an Hebrew, one of his brethren, but, in the language of Deuteronomy, "he hated him not in time past." As a result he had to flee the country, and went to the land of Midian. There he remained till after the death of the king of Egypt. Now the Mosaic provisions on this subject aim at regulating the blood feud and making it the servant of law, partly by ensuring a proper trial, and partly by protecting from the avenger of the blood the man who had caused death unwittingly. This was effected by the institution of cities of refuge to which the man-slayer was to flee, even as Moses himself had fled to the land of Midian. The congregation was then to judge between the smiter and the avenger of the blood; and in the event of their finding that the smiter did not deserve death, he was to be restored to the city of refuge, and to dwell therein until the death of the high priest, as Moses had dwelt in the land of Midian till the death of the king. Afterwards he was to return into the land of his possession, as Moses had returned to Egypt. The high priest was of course the only permanent hereditary official of the Mosaic constitution; but partly by connecting the sojourn in the city of refuge with his life, and partly by making the cities of refuge Levitical cities, the institution was linked with religion in a manner which must at all times have been obvious even to those who were most ignorant of the

wording of the law. This must have greatly strengthened the law in practical working. One other point should be noticed. The first remarkable action in the career of Moses was to kill the Egyptian. His last reported normal action—I of course except matters connected with the Deuteronomic covenant, his leave-taking, the appointment of his successor, and his death, all of which may fairly be regarded as abnormal—was the setting aside of three cities of refuge [Deuteronomy iv. 41-43].

The book of Genesis gives us a glimpse of an earlier law of homicide. In iv. 14 Cain says—

Behold, thou hast driven me out this day from the face of the ground ; and from thy face shall I be hid ; and I shall be a fugitive and a wanderer in the earth ; and it shall come to pass, that whosoever findeth me shall slay me.

These words remind us of the Roman *Sacratio Capitis*.

The *homo sacer* was in every sense of the word an out-cast,—one with whom it was pollution to associate, who dared take no part in any of the institutions of the state, civil or religious, whose life the gods would not accept as a sacrifice, but whom, nevertheless, any one might put to death with impunity as no longer god-protected [Muirhead : “Roman Law,” 17-18].

It is not within the sphere of this work to consider the numerous other resemblances between the religious-legal ideas of ancient Roman and ancient Hebrew society.

CHAPTER V

THE INTER-RELATION OF THE LEGAL PASSAGES

LIKE the XII Tables, the Pentateuch pre-supposes much customary law that was doubtless well-settled, and never presents us with a complete view of Israelite law in the Mosaic age. To find such jural laws as it contains we have to look in many different passages. They may be classified as follows :—

I. The covenant document in Exodus, with which we may group Numbers xxxv. 9-34, the passage, which, in accordance with the promise in Exodus xxi. 13, provides for the institution of cities of refuge.

II. Passages like those relating the Sabbath covenant [Exodus xxxi. 12-17 and xxxv. 1-3], which contain some jural law, but which are dominated by purely religious conceptions, such as that of holiness.

III. Passages like those relating to the cases of the son of Shelomith and the daughters of Zelophehad, where some event gives rise to a difficulty, which results in the declaration of legal principle.

IV. The covenant document of Leviticus xxv. and xxvi.

V. The covenant document in Deuteronomy.

The consideration of the second of these classes belongs to the student of religious ideas rather than to the lawyer, and I have therefore formed no opinion on the relation in which the passages grouped in it stand to the other legal passages. The third class gives rise to no difficulties. In each case the event narrated is the occasion for the declaration of law: in each case purely jural law is laid down which the courts can enforce in

the ordinary course ; in no case is this law ever repeated. Nothing could be simpler : nothing could stand less in need of explanation.

Nor is there any greater difficulty in understanding the collection of jural laws in Leviticus xxv. The land having been promised to Abraham in a covenant, it is natural that the land laws should become terms of the covenant, and we have seen that all the jural laws of this chapter are land laws or laws closely connected with them. And here, too, as in the last class, we are dealing with jural laws which are never repeated.

We are therefore left face to face with the single question of the relations between those passages in the Sinaitic and Deuteronomic covenant documents which are of special legal interest. The first fact that emerges from a study of Exodus xxi. 2-xxii. 17 (16) is that it consists of a body of private law—and in this term I here include criminal law—arranged according to an intelligible principle. The text first treats of the manumission of Hebrew slaves, xxi. 2-11, then of injuries to human beings, 12-32, next of injuries to cattle, 32-36, lastly of other wrongs to property, xxii. 1 (xxi. 37)-xxii. 17 (16). As must inevitably happen in every classification of legal rules, there are laws which could be inserted in either of two places. Thus xxii. 10-13 (9-12), dealing with the case of an animal being damaged, while under the care of a neighbour, who has been entrusted with its custody—I purposely avoid legal terms—is placed after the provisions applicable in case of a theft of deposited goods, and not with the law of injuries to cattle. Such points give rise to no difficulty.

Starting with the general principle that a rule of private law, using the term in the sense indicated, must be looked for in Exodus, and that such rules are not usually repeated in the Pentateuch, we are naturally led to ask whether it be possible to suggest reasons for

the recurrence of some rules. One reason lies on the surface. Deuteronomy was intended for public reading. Take the first case of apparent repetition. Exodus xxi. 2-6 lays down law relating to the manumission of Hebrew slaves acquired by purchase. Now this law was entirely opposed to the pecuniary interest of the masters. It was only too probable that the law would speedily become a dead letter, and we know from Jeremiah xxxiv. 8-22 that this did in fact happen. So we find a passage in Deuteronomy [xv. 12-18], consisting not of jural law, but of commandments interwoven with appeals to the master's feelings. It is clear from what Jeremiah tells us that this passage did succeed in influencing opinion to some extent.

But perhaps it may be thought that I am explaining too much. If this was a valid reason for inserting in Deuteronomy commandments relating to the manumission of slaves, and if these commandments did in fact effect some good, why do we not find a commandment dealing with the case of the slave wife of Exodus xxi. 7-11? Owing to our ignorance of the circumstances of the age, and especially of its legal procedure, we can feel no certainty: but the difference in the respective positions of the persons affected by these laws is very striking. The wife would have her relations, who would naturally see that the law was enforced. The slave, on the other hand, had no natural protectors. His position reminds us of the constant exhortations to assist the widow, the fatherless, and the stranger.

The next set of repetitions concerns the law of homicide. I have already explained the institution of cities of refuge: here we must notice that at the date of the Sinaitic covenant the office of high priest had not been created, so that in Exodus we only find a promise to appoint a place whither the manslayer shall flee. Numbers brings us a complete statement of the law.

But this great legal reform had a strong and deep-rooted feeling against it. From what we know of early law, it was no easy task in an age when authority was weak to induce an avenger of blood to renounce his vengeance. Hence we are not surprised to find commandments in Deuteronomy which would influence public opinion. One other point remains to be noticed. Between the great speech with which the book of Deuteronomy opens and the heading of the covenant document, we find the verses which narrate the setting apart of three cities of refuge by Moses. At the reading of the Law in the year of the release, these three verses, made prominent by position, must also have exerted enormous influence on the listeners.

The last instance must be left to the student of religious ideas. Exodus xxi. 16 deals with the case of a free Israelite being kidnapped. Deuteronomy xxiv. 7 contains a similar provision in slightly different terms, but with the significant addition "so shalt thou put away the evil from the midst of thee."

Just as the covenant of Exodus enacts the great collection of private law—other than land law—and that of Leviticus the land laws, so the covenant document in Deuteronomy contains what, for want of a better expression, we must call the public law. It is in Deuteronomy that we look for the laws of war, constitutional law, commandments or maxims intended to shape the future course of legislation, new laws rendered necessary by the disappearance of Moses, and such institutions of private law as depended mainly or wholly on public opinion. Stated more briefly, it may perhaps be said that the legal contents of Deuteronomy are determined by its popular character and by the altered circumstances of the time. I can probably explain this best to a modern reader by departing in this instance from the order of the book itself, and grouping the

passages with which I have to deal on a different principle, but I ought first to suggest an explanation of the order adopted by Moses in Deuteronomy. The theory of the association of ideas may be expected to throw light on the order, at any rate of some portions of the book, and accordingly I transcribe the following :—

Thought succeeds thought ; idea follows idea, incessantly. If our senses are awake, we are continually receiving sensations, of the eye, the ear, the touch, and so forth ; but not sensations alone. After sensations, ideas are perpetually excited of sensations formerly received ; after those ideas, other ideas : and during the whole of our lives, a series of those two states of consciousness, called sensations, and ideas, is constantly going on. I see a horse : that is a sensation. Immediately I think of his master : that is an idea. The idea of his master makes me think of his office : he is a minister of state : that is another idea. The idea of a minister of state makes me think of public affairs ; and I am led into a train of political ideas ; when I am summoned to dinner. This is a new sensation, followed by the idea of dinner, and of the company with whom I am to partake it. The sight of the company and of the food are other sensations : these suggest ideas without end ; other sensations perpetually intervene, suggesting other ideas : and so the process goes on [James Mill : “Analysis of the Human Mind,” I. 52-53].

I imagine that if any legislator had followed the order suggested by the above passage (thus : regulations for riding or driving horses, laws relating to property, constitutional laws, &c.), the result would have been as perplexing to anybody who did not know the secret, and was not accustomed to associate horses with ministers of state, as the order of the Pentateuch appears to most modern readers. Yet it might have made it easier for persons who did associate horses with ministers to remember the law, and this theory will often help us to follow the arrangement of Deuteronomy. It is not at first sight obvious why a command not to take a mill or upper millstone in pledge should be

followed by a law forbidding kidnapping [Deuteronomy xxiv. 6-7], but when we read of the pledgee "for he taketh a man's life to pledge," we see that there is a connection of thought, which may have had a mnemonic value. Similarly in xxiii. we find a group of rules dealing with the "assembly of the Lord," followed by rules relating to the discipline of a camp. These are extreme cases; the connection of thought is often perfectly clear to any reader; but in places where that is not so, it is not unnatural to conjecture that, owing to the ideas of the age in which Deuteronomy was written, the arrangement had a value which it has now lost.

Turning from the order to the contents, we find that Deuteronomy contains the laws of war [xx. 10-20]. This naturally leads us to point out that it is in this book that we find the rules for the organisation of the army [xx. 1-9], the exemption of the newly-married Israelite from military service and the provisions for the internal discipline of the camp [xxiii. 9-14]. One other law of this class finds a place in Deuteronomy, a measure for the protection of the female captive whom her master takes to wife [xxi. 10-14]. It is parallel to the law of Exodus xxi. 7-11 dealing with the case of a girl who has been sold by her father as a slave wife. None of these provisions are found elsewhere in the Pentateuch.

Under the head of Constitutional Law we may class Deuteronomy xvii. 8-20, dealing with the declaration of new law, 8-13, and the establishment of a kingdom, 14-20, and the provision for the appointment of judges and officers [xvi. 18]. It need scarcely be said that there was not much room for such laws while Moses was at the head of the Israelite organisation. Whether he was technically king of Israel in the eyes of his contemporaries we do not know—in xxxiii. 5 we read that he was king in Jeshurun, but the passage is poetical—

but clearly there was no room for any other king in his lifetime. So, too, with new law ; if any difficulty arose, it was of course taken to Moses. A similar remark applies to the provisions in xviii. 15-22 as to prophets. So long as Moses was alive, he would discriminate between true and false prophets.

I come next to certain passages which may be roughly classed as belonging to criminal law of a religious nature. The key to the ideas they embody seems to lie in the words, "so shalt thou put away the evil from the midst of thee." To this class it is convenient to assign chapter xiii. dealing with the prophet and the brother, who led the people astray, and the city that goes astray ; xvii. 2-7, the law relating to the worship of other gods ; certain laws of purity, xxii. 13-30 ; and the law of rebellious sons, xxi. 18-21.

Deuteronomy contains a number of passages that relate in some way to private law ; but they all deal with rules or institutions that depend to a greater or lesser extent on public opinion. The supposed repetitions have already been considered ; it remains to deal with certain other passages that relate to private law.

We find a passage relating to the inheritance of sons in xxi. 15-17. The firstborn is to receive the double portion to which his birth entitles him in the day that the father "causeth his sons to inherit that which he hath," even though he should be the issue of a wife whom her husband hates. Nobody knows whether some rudimentary form of will is here referred to or a gift *deducto usufructu*, that is, with a life interest reserved ; but from our present point of view this is immaterial. What we have to notice is that the son is apparently not given any remedy by this passage if the father attempts to deprive him of his due share, except what the customary law would give him apart from this,—"the right of the firstborn is his," whatever that may mean.

So, too, xxiv. 1-4 prohibits a man who has divorced his wife from taking her back after a union with some other husband ; but no penalty is enacted. What would have happened to a man who violated this prohibition ? We do not know.

But the most instructive instance of all is supplied by the law of levirate, xxv. 5-10. Here the appeal is frankly to public opinion and nothing else. The man who will not comply with the requirements of the law is to be brought before the elders.

9. Then shall his brother's wife come unto him in the presence of the elders, and loose his shoe from off his foot, and spit in his face ; and she shall answer and say, So shall it be done unto the man that doth not build up his brother's house.

10. And his name shall be called in Israel, The house of him that hath his shoe loosed.

Clearly this sanction would only be of avail so long as public opinion made it a real disgrace. Once this had ceased to be the case and the origin of the ceremony had been forgotten, it was bound to sink into the meaningless and uncomprehended transaction that it appears to have been in the days of Ruth.¹

The other instances may be more rapidly reviewed. Deuteronomy xxiv. 10-15 contains provisions relating to pledge and hired servants, which clearly depend for their binding force on public opinion and the effect they may have on the feelings of lenders and employers of labour, not on the intervention of the courts. The release law of Deuteronomy xv. 1-11 could of course be enforced by the courts, *once the money had been lent*, but this, too, was opposed to one of the most abiding sentiments of human nature.

¹ Ruth iv. 7. "This was the custom *in former time* in Israel" is the language of a man who is attempting to explain a ceremony with which he is not acquainted. The explanation is probably misleading.

Lastly, the book contains a number of passages that appear to be intended to shape the future of the law. Till the code of Hammurabi was discovered, great obscurity hung over xxiv. 16.

The fathers shall not be put to death for the children, neither shall the children be put to death for the fathers: every man shall be put to death for his own sin.

There is no trace of any custom at all resembling what is here aimed at, anywhere in the Bible; and if such a practice had ever obtained in Israel, Moses and the prophets would have thundered against it in very different terms to these. But the mystery is now cleared up, for in the code of Hammurabi we read—

If the distress has died in the house of his distrainer, of blows or of want, the owner of the distress shall put his merchant to account, and if he be the son of a freeman (that has died), *his son one shall kill*; if the slave of a freeman, he shall pay one-third of a mina of silver, and he shall lose all that he gave whatever it be [§ 116, cf. §§ 210 and 230].

It thus appears that the verse under consideration actually was aimed at a practice enforced by Babylonian law; and the prohibition was clearly intended as a safeguard against the possibility of its ever being introduced among the Israelites. Probably we should regard a number of other verses as intended to safeguard the future. Numbers xxxv. 30—

One witness shall not testify against a man that he die,—

shows us clearly that at least two witnesses were required in any case where a sentence of death could be pronounced, but we find the general principle broadly laid down in Deuteronomy xix. 15. Again, in Deuteronomy xxiii. 19–20 we find a general prohibition of usury, in xxi. 22–23, a command not to leave the

body of a man that is hanged exposed all night, and in xxv. 1-3 a precept not to exceed forty stripes in punishment. Surely it would be wrong to regard this as new law. Nobody will suggest that Moses ever sentenced a man to more than forty stripes. It seems more natural, therefore, to treat such passages as directed to the future moulding of the law than to its condition in the Mosaic age, when these principles were doubtless recognised by the courts.

CHAPTER VI

THE SPIRIT OF THE LEGISLATION

IT remains to bring together a few facts about the spirit of the legislation. The first question that naturally suggests itself is : How does the Mosaic legislation compare with the code of Hammurabi? My readers have already had some opportunities of contrasting the two laws, but it is right to insert Hammurabi's provisions regarding one or two offences that are also dealt with by the Mosaic code. It must be remembered that the laws of Hammurabi are designed for a far more advanced state of society than the Pentateuch. Nevertheless the two codes necessarily have some topics in common. I select the provisions as to theft and some injuries to the person. We have already seen how the Mosaic laws on these subjects compare with the early Roman rules.

If a man has stolen ox or sheep or ass, or pig, or ship, whether from the temple or the palace, he shall pay thirtyfold. If he be a poor man, he shall render tenfold. If the thief has nought to pay, he shall be put to death [§ 8].

If a man has caused the loss of a gentleman's eye, his eye one shall cause to be lost [§ 196].

If he has shattered a gentleman's limb, one shall shatter his limb [§ 197].

If he has caused a poor man to lose his eye or shattered a poor man's limb, he shall pay one mina of silver [§ 198].

If he has caused the loss of the eye of a gentleman's servant or has shattered the limb of a gentleman's servant, he shall pay half his prices [§ 199].

If a man has made the tooth of a man that is his equal to fall out, one shall make his tooth fall out [§ 200].

If he has made the tooth of a poor man to fall out, he shall pay one-third of a mina of silver [§ 201].

It may be added that the code of Hammurabi recognises such punishments as branding [§ 127], impaling [§ 153], cutting out a tongue [§ 192], tearing out an eye [§ 193], cutting off a woman's breasts [§ 194], cutting off hands [§§ 195 and 226] and cutting off an ear [§ 282]. Comment is superfluous.

Two charges are sometimes brought against the laws of the Pentateuch. It is said that they are barbarous, and also that they are unpractical. The second charge may be very briefly disposed of. We have seen that some of the laws that are regarded as unpractical—the jubile for example—actually worked. With regard to the others, nobody who understands the spirit and power of the Torah can doubt for an instant what the answer is. Some of the provisions in question, as, for example, that against taking interest, are still moulding men's lives. With regard to others, such as that for emancipating bought Hebrew slaves after six years, we may feel certain that in some cases they operated, and we call to mind the case of Sodom: "I will not destroy it for the ten's sake."

So far as I am aware, the other accusation rests mainly on a misapprehension of the meaning of the passages dealing with talion, and I therefore proceed to consider them. The first is in Exodus xxi. :—

22. And if men strive together, and hurt a woman with child, so that her fruit depart, and yet no mischief follow : he shall be surely fined, according as the woman's husband shall lay upon him ; and he shall pay as the judges determine.

23. But if any mischief follow, then thou shalt give life for life,

24. Eye for eye, tooth for tooth, hand for hand, foot for foot,

25. Burning for burning, wound for wound, stripe for stripe.

The first case contemplated is quite clear: the offender is to pay a sum to be determined by the judges. In the second case "thou shalt give." Who is to give? Clearly not the judges, for in that case we should have a plural verb. The offender, therefore, is to give a "life." This does not mean that he is to die. In that case we should have had some phrase like "shall surely be put to death." To give a life is not the same as to be executed; and it is not for nothing that we find the second person instead of the third. We need not look far for an explanation. In the two verses immediately preceding this law [20 and 21] we read of the case of a man who smites his slave so that he die; and we find that he is not to be punished if he lingers a day or two, "for he is his *money*." This word "money" does not mean property. It means blood-money. The loss of the value of the slave is here treated as the equivalent of paying ransom. There was a customary law by which in cases of injury to person a pecuniary composition was paid. No wonder it is possible to say "thou shalt give a life." A "life" meant the ransom laid upon a man for his life [xxi. 30]. We know that ransom more or less replaced the actual talion and the blood feud in all early societies. In this respect the course of legal history was similar in all the races that have progressed. We found parallels when we were considering some resemblances between Roman and Hebrew law. It is impossible to say on the internal evidence of the Pentateuch to what extent the practice of paying composition had been carried in the Mosaic age: but there is one significant passage. Ransom was apparently so universal that it was necessary to forbid it in two cases of homicide:—

31. Moreover ye shall take no ransom for the life of a manslayer, which is guilty of death: but he shall surely be put to death.

32. And ye shall take no ransom for him that is fled to his city of refuge, that he should come again to dwell in the land, until the death of the priest [Numbers xxxv.].

An interesting illustration this, of the extreme difficulty of dealing with a system of law that is not actually working. No law can be construed by the light of nature. To any modern reader who has not had a legal training, the rule "He that smiteth a man so that he die &c.," must seem so clearly to mean that a murderer is to be put to death, that he would not think any other construction possible: yet the legal ideas of the Mosaic age were such that ransom had to be expressly forbidden in this case.

We can now understand the reason for the curious language of Exodus. It is quite easy to see that if two men were fighting, and a woman who was looking on were hurt, she might receive a mortal injury or she might have an eye or tooth knocked out. But what does "hand for hand" mean? And "foot for foot?" And "burning for burning?" And "stripe for stripe?" At the least, it is not obvious how she could accidentally get her hand or foot cut off, and the burning and the stripe would be quite impossible. And why is the law expressly limited to pregnant women? After all, they would only supply a small proportion of the possible and probable spectators of a fight. But, once we understand that there existed a customary law which provided for all usual cases of injury, we see how the Israelites of the Mosaic age would have construed the passage. If the woman herself were not injured, but harm was inflicted on the new life, the compensation was to be assessed by the judges. But if the woman also suffered, the common law was to apply, and the usual compensation was to be paid. Hence the use of terms which to those, who do not realise the circumstances of the age, and the meaning they had come to bear, would not appear apt.

The next passage is in the judgment in the case of Shelomith's son. The words "life for life" occur again here [Leviticus xxiv. 18], but they are applied to the case of a beast being killed.

And he that smiteth a beast mortally shall make it good :
life for life.

Probably this merely means the value of the animal or else the animal itself. The passage continues—

19. And if a man cause a blemish in his neighbour ; as he hath done, so shall it be done to him ;

20. Breach for breach, eye for eye, tooth for tooth : as he hath caused a blemish in a man, so shall it be rendered unto him.

This judgment does not forbid ransom, and in view of the passages that have already been considered, we must therefore regard it as at the least permitting it. At the same time it must always be remembered that the money payment originally was a substitute for the infliction of an actual physical penalty : and it was the possibility of exacting this that acted as a compulsion to the payment. The internal evidence of the Pentateuch would not warrant the statement that this physical penalty could not be inflicted in the Mosaic age. Neither would it warrant the statement that it could.

The last passage is in Deuteronomy xix., and relates to false witnesses. It does not apply in every case of untrue evidence, but simply to those cases in which false evidence is directed to procuring the punishment of an innocent man. Here is the text :—

16. If an unrighteous witness rise up against any man to testify against him of wrong-doing ;

17. Then, both the men, between whom the controversy is, shall stand before the LORD, before the priests and the judges which shall be in those days ;

18. And the judges shall make diligent inquisition: and behold, if the witness be a false witness, and hath testified falsely against his brother;

19. Then shall ye do unto him, as he had thought to do unto his brother: so shalt thou put away the evil from the midst of thee.

20. And those which remain shall hear, and fear, and shall henceforth commit no more any such evil in the midst of thee.

21. And thine eye shall not pity; life for life, eye for eye, tooth for tooth, hand for hand, foot for foot.

It is submitted that on one point the construction of this passage is absolutely clear. In a proper case the death penalty is to be inflicted. This dominates the language of the law. There is no phrase like "thou shalt give a life," but instead we find the clear "ye shall do unto him &c.," addressed to the whole congregation. "So shalt thou put away the evil" and "those which *remain*" admit of only one construction. In a case where a man tries to murder his brother by giving false evidence, this law decides that the false witness must be put to death. To make the scope and spirit of the law quite clear, it is best to take an illustration.

Ahab, king of Israel, desired to purchase the vineyard of one Naboth, who, however, refused to sell. Therefore two worthless men were induced to swear that Naboth had been guilty of certain crimes, although in fact he was innocent. Naboth was put to death. Under this law, if it had been properly applied, the witnesses would have been put to death instead.

The remaining words are less easy to construe, but it seems to me that they can only refer to the law of talion, and that the rules as to money composition would therefore apply. What is the alternative? It is to suppose that Deuteronomy, which prohibits the infliction of more than forty stripes, recognises four barbarous punishments, which we never meet with in

the Bible : the cutting off of a hand or a foot, and the knocking out of a tooth or an eye. Nor does the language of the rest of the passage lend any colouring to this view : for it is only apt, if it be regarded as referring to the taking of life. It would not be possible, for example, when a tooth had been knocked out, to say—

Those which *remain* shall hear, and fear, and shall henceforth commit no more any such evil in the midst of thee.

We must therefore treat the words as referring simply to the case of the witness who falsely testifies that his brother has done some act which would bring him within the purview of the law of talion. The expressions must then be construed as meaning that he is to suffer the penalty that would have been inflicted on the man against whom he testified. In that case the law means that the same fines would be exacted from the false witness as would be paid by a man who had done his neighbour the bodily injury to which the witness falsely testified.

There is one other point to which attention should be drawn. It is sometimes said that the Pentateuch prescribes a merciless course of conduct towards those who were not Israelites. How strangers were to be treated by the courts we now know : but it is not always realised how entirely unique are the mitigations of war contained in Deuteronomy xx. 10–20. The world never saw their like until the influence of the Bible began to modify the practice of European nations.

And now how does the law of the Pentateuch contrast with Roman law? My readers have had some opportunity of comparing and contrasting the provisions of the two systems on such topics as debt, strangers, theft, deposit, and talion. The paternal power was as great among the Romans as among the

Hebrews, but the laws for the manumission of Hebrew slaves find no parallel at Rome. As to the general treatment of slaves, the position of the Roman slave was most gruesome. A clear and vivid picture is presented in the following passage of Gaius :—

The law Aelia Sentia enacts that slaves who have been punished by their proprietors with chains, or have been branded, or have been examined with torture on a criminal charge, and have been convicted, or have been delivered to fight with men or beasts, or have been committed to a gladiatorial school or a public prison, if subsequently manumitted by the same or by another proprietor, shall acquire by manumission the status of enemies surrendered at discretion [Gaius, I. 13, Poste's translation].

The Pentateuch, on the other hand, provides that if a man knock out his slave's eye or tooth, the slave is to go free [Exodus xxi. 26–27] ; and a runaway slave is not to be surrendered to his master, but to dwell unmolested in any town he may choose [Deuteronomy xxiii. 15, 16]. The only forms of inflicting the death penalty recognised by the Pentateuch are stoning, burning, and hanging ; but at Rome the "*parricida*"—a wider term than our parricide—was tied up in a sack with a dog, a cock, a viper, and an ape, and thrown into the sea or a river,—

in order that even before death he may begin to be deprived of any enjoyment of the elements, and that the air may be denied him while alive, and interment in the earth when dead [Justinian, Inst. IV. tit. 18, § 6].

And with the burning of the daughter of the priest [Leviticus xxi. 9], the worst punishment in the Pentateuch, we may contrast the case of an unchaste vestal virgin who was scourged, attired like a corpse, and buried alive in a small cell containing a couch, a lamp, and a table with a little food, while her lover was publicly scourged to death.

So far as I am aware, no other system could afford a comparison with the Pentateuch any better than the Roman law. And so, after a hundred generations, the words of Moses are more impressive than when they were first uttered :—

“Behold, I have taught you statutes and judgements, even as the LORD my God commanded me, that ye should do so in the midst of the land whither ye go in to possess it.

“Keep therefore and do them ; for this is your wisdom and your understanding in the sight of the peoples, which shall hear all these statutes, and say, Surely this great nation is a wise and understanding people.

“For what great nation is there, that hath gods so nigh unto them, as the LORD our God is whensoever we call upon him ?

“And what great nation is there, that hath statutes and judgements so righteous as all this Torah, which I set before you this day ?” [Deuteronomy iv. 5-8].

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THE END

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